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POSSIBLE FUTURE WORK

Note by the Secretariat

Proposals for possible future work made at the UNCITRAL Congress

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INTRODUCTION

1. The UNCITRAL Congress on International Trade Law on the theme "Uniform commercial law in the 21st century" was held from 18 to 22 May in New York, in the context of the twenty fifth-session of the Commission. Amongst the main topics for discussion were the process and value of unification of commercial law, sale of goods, services, payments, electronic data interchange, dispute settlement, transport and the future role of UNCITRAL. It is expected that the proceedings of the Congress will be published by the end of 1993.

2. One of the pricipal aims of the Congress was to provide participants, who included practising lawyers, government officials, judges, arbitrators and teachers of law, with a forum in which to voice their practical needs as a basis for future work by the Commission and other formulating agencies. Many speakers at the Congress did indeed make proposals on topics that the Commission and other formulating agencies could take up as part of their future work. The proposals were made in different contexts, with some being more definite recommendations for future work while others were suggestions that a certain topic may be worthy of study. Some proposals were very specific and concrete while others were of a more general nature. A list of the proposals made is presented in part I of this note, without stating the number of times that a particular topic was proposed or the strength of the recommendation. The note also presents, in part II, what action the Secretariat has taken on some of the proposed topics.

3. In addition to the proposals for undertaking work on harmonization of rules, a number of other suggestions were made. Most of them were generally aimed at either enhancing coordination with other agencies involved in international trade law, promoting uniformity in interpretation of uniform texts or increasing the dissemination of texts emanating from the Commission. Those suggestions are listed in part III of this note. The Secretariat will examine these suggestions and, if regarded appropriate, implement them within available resources. Some of the proposals are already being implemented. An example of this (though not being implemented by the Secretariat) is the setting up of the International Moot Arbitration Competition which is designed to increase public awareness of the United Nations Sales Convention, the Model Arbitration Law and the UNCITRAL Arbitration Rules.

I. TOPICS FOR HARMONIZATION AND UNIFICATION OF RULES

Proposals on general contracting

1. Preparation of an explicit set of guidelines covering the problems created by discrepant standard contract forms ("battle of forms").

2. Preparation of model texts setting forth a variety of warranty and corresponding liability limitation clauses.

3. Achieving some measure of unification with respect to the validity of exemption clauses.

4. Development of international standards for evaluating unfair, unreasonable or unconscionable terms in contracts.

5. Uniform rules on enforceability of penalty and liquidated damages clauses in international contracts.

6. Development of a multilateral framework of rules and principles to provide for a fair trade in services.

7. Elaboration of rules on the protection of trade/business information in cross-border transactions.

Proposals on specific types of contracts

1. A general review of the most common standard sales conditions in international sales particularly the choice of law clauses.

2. Preparation of a legal guide on privatization contracts.

3. Fair contracts for the sale of commodities.

4. Legal guide on marine insurance contracts.

5. Preparation of model clauses or provisions to facilitate implementation of "build, operate, transfer" (BOT) projects.

6. Integration of some model forms of contract into the text of future editions of the Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.

7. Buy-back agreements in joint venture transactions.

8. Management contracts by non-equity owners.

9. Uniform terms in insurance contracts.

10. Contracts for the transfer of technology.

11. Association agreements and mergers.

12. A legal guide for franchisees and a standard form or model disclosure law for franchise agreements.

13. Rules setting standards of service for brokerage services, including those of stocks, real estate and commodities.

14. Simplification and standardization of the formalities and documentation as well as harmonization of the basic principles of trademark protection.

15. Model laws on protection of intellectual property and patents.

16. Rules setting standards for the tourist industry, including those of hotels and travel agencies.

Payments and security interests

1. Harmonization of banking regulations (e.g. in reporting requirements).

2. Assignment of claims and security interests in different types of property.

3. Uniform laws on retention of title.

4. Uniform rules on the liability of banks.

5. Coordination and harmonization between the United Nations Commission on International Bills of Exchange and International Promissory Notes (1988) and the Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes and Invoices (1975).

6. Security interests in trade marks and service marks.

7. Harmonization of laws on elimination of money laundering.

8. Uniform rules on appropriate and secure assignments of letters of credit.

9. International aspects of bankruptcy.

Electronic data interchange (EDI)

1. Development of an international legal framework to address the issues presented by the growth of electronic commerce.

2. Elaboration of uniform rules concerning the liability of intermediary network providers.

3. Development of standards for data protection.

4. Supplementing the UNCITRAL Legal Guide on Electronic Funds Transfers to deal with flight capital and tax evasion situations.

5. Uniform law on admissibility of evidence in electronic form.

6. Negotiability of electronic documents.

7. A model agreement for electronic payment orders.

Dispute settlement

1. Harmonization of rules on award of interest, including determination of rate of interest, in international commercial arbitration.

2. Survey of effectiveness of national application of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

3. Solutions to problems that arise in multiparty arbitration.

4. Preparation of a legal guide on pre-hearing conferences in international commercial arbitration, e.g. on the presentation of evidence.

5. Update of the 1958 New York Convention in particular with regard to enforceabilty of interim measures.

6. Clarification of certain issues arising out of the 1958 New York Convention, e.g. determination of internationality of an agreement under article II or the issue of refusal of enforcement on the grounds of public policy.

7. The effect of arbitration on the running of limitation periods.

8. Provisions on costs in arbitration and on the liability of arbitrators.

9. "Preventive dispute settlement" clauses.

10. Establishment of specialized courts entrusted with assistance in and supervision of arbitration.

Other topics

1. A uniform antimonopoly law.

2 Transnational tax laws.

3. Environmental labelling for products or services.

4. Consumer protection law.

II. ACTION BY THE SECRETARIAT

1. To facilitate decisions by the Commission on possible future work, the Secretariat has prepared notes on some of the suggested topics. The introductory notes are presented as addenda to this note and concern the following topics: procurement of services (addendum 1), pre-hearing conference in international commercial arbitration (addendum 2), assignment of claims (addendum 3), cross-border insolvency (addendum 4), and privatization (addendum 5). The notes present a preliminary look at the issues and the legal problems that exist in these areas that may act as an impediment to international trade. They also set out the work that has been done in the past, either by UNCITRAL or other organizations, and discuss the desirability and feasibility of future work on each of these topics. Notes of that nature on other topics will be presented at future sessions.

2. In addition to the notes referred to in the preceding paragraph the Secretariat has been monitoring developments on work that is being carried out in other organizations on some of the proposed topics. An example of this is the proposal made during the Congress that the Commission should consider future work in the field of the Build, Operate and Transfer (BOT) project financing concept.

3. BOT is conceived as a way to reduce pressure on the use of public funds for project financing and to promote the transfer of technology through the involvement of the private sector in financing, building and operating infrastructure projects. In its most basic form, a BOT project is where the

Government grants a concession for a period of time to a consortium for the development of a project. The consortium finances or arranges for financing for the project, constructs the project, and operates and maintains the facility during the life of the concession. Meanwhile, through sale or charge for use of the facility or its products, the consortium recovers returns on its equity and pays off its debts. At the end of the concession period the project is transferred to the Government.

4. In order to promote and facilitate the utilization of the BOT concept, the United Nations Industrial Development Organization (UNIDO) is currently preparing "Guidelines for the Development, Negotiation and Contracting of BOT Projects". They are to be finalized by early 1994. The Guidelines will deal with the strategy and development of BOT arrangements and the major issues of implementing BOT projects. These include: economic viability of the project, financial and risk allocation aspects, governmental support, legal and political environment, procurement, structure and negotiating of the contractual package, transfer of technology, maintenance and transfer of ownership. The Guidelines will also deal with the standard project agreement and standard provisions for BOT contracts.

5. The Secretariat participated in UNIDO's first preparatory meeting of experts on the Guidelines and will continue to cooperate with UNIDO in this respect. The Secretariat intends to prepare a note for the next session of the Commission on the desirability and feasibility of possible future work in the area such as the preparation of a legal guide on contracting for BOT or on model legislation enabling contractual relations for BOT including, in particular, the concession agreement.

III. PROPOSALS ON COORDINATION, UNIFORM INTERPRETATION AND DISSEMINATION

Coordination

1. Enhancement of the Commission's original mandate to coordinate legal activities in the field of international trade law.

2. Enhancement of coordination with other international organisations in the promotion of uniform texts and in legal training and assistance.

3. Promotion of the work undertaken by the United Nations Conference on Trade and Development (UNCTAD), e.g., on restrictive trade practices.

4. Coordination with other international organizations and United Nations agencies in utilizing UNCITRAL's work in regional commercial law unification efforts.

5. Submission of texts by other formulating agencies to UNCITRAL for endorsement.

6. Consideration of holding joint working groups with the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law.

Promotion of uniform interpretation

1. Establishment of a court of international trade and of uniform law to which States could refer any disputes on the application and interpretation of uniform law.

2. Establishment of an international tribunal for resolution of questions arising from the application of the United Nations Sales Convention.

3. Establishment of an accessible computerized data base containing decisions on the United Nations Sales Convention.

4. Issuance of a periodical to publish differing applications and interpretations concerning international trade law.

5. A General Assembly resolution encouraging the reporting of national cases regarding the interpretation and application of uniform laws.

6. Establishment of an expert panel to review and investigate complaints by States about problems in the application and interpretation of uniform laws.

7. Preparation of a convention on principles for the interpretation and application of uniform law.

8. Issuance of an official commentary and recommendations on the application of the United Nations Sales Convention (e.g. on fundamental breach of contract and on exemption clauses).

9. Preparation of official commentaries on UNCITRAL texts.

Dissemination of information

1. Promotion of the inclusion of UNCITRAL texts in the teaching of international trade law, together with manuals and university curricula for such teaching.

2. Establishment of an UNCITRAL Moot Arbitration Program.

3. Establishment of an UNCITRAL Newsletter.

4. Establishment of an international documentation centre for commercial law.

Others

1. Establishment of a scholarship or endowment in honour of Professor Clive M. Schmitthoff.

2. Establishment of national UNCITRAL support groups.

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Addendum

Procurement of services

Note by the Secretariat

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INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. The Working Group commenced its work on this topic at its tenth session, held from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). The Working Group devoted its eleventh to fifteenth sessions to the preparation of the draft Model Law on Procurement which is before the Commission at the present session for final review and adoption (the reports of those sessions are contained in documents A/CN.9/331, 343, 356, 359 and 371).

2. At its tenth session the Working Group decided to limit the Model Law, at least initially, to the procurement of goods or construction and not to deal with the procurement of services (A/CN.9/315, para. 25). The Working Group decided that it would be preferable to first finalize model statutory provisions for the procurement of goods or construction before elaborating such provisions for the procurement of services. A principal reason for this decision was that certain aspects of the procurement of services are governed by different considerations from those that govern the procurement of goods and of construction.

3. As the preparation of model provisions on the procurement of goods and of construction is being completed at the present session, the Commission may wish at this stage to consider the possibility of formulating model statutory provisions for the procurement of services. At the fifteenth session the Working Group lent its support to the preparation by the Secretariat of a note on the desirability and feasibility of preparing uniform model provisions on the procurement of services. The Working Group indicated that the note could envisage different possible options as to the scope of services to be covered by such provisions (A/CN.9/371, para. 255). Accordingly, the present note addresses the desirability of preparing model provisions on the procurement of services, the main differences between procurement of services and procurement of goods or construction, and the possible contents of the model statutory provisions. The note also presents, in its annex, the proposed text of possible amendments and supplements to the UNCITRAL Model Law that would be designed to expand its scope to cover the procurement of services.

I. DESIRABILITY OF PREPARING MODEL STATUTORY PROVISIONS ON PROCUREMENT OF SERVICES

4. While the procurement of goods and of construction takes up the larger portion of the procurement budgets of most public entities, services constitute a significant component of total Government procurement in most countries. Futhermore, it would appear that the trend towards privatization will lead to the transfer to the private sector of services previously

performed exclusively by Government. However, many countries lack a well regulated system for the procurement of services.

5. National laws on the procurement of services display differences from State to State. While the laws of some States do contain provisions on the procurement of services, the laws in some other States do not clearly differentiate between the procurement of goods or construction and the procurement of services, and therefore fail to take account of the specific circumstances relevant to procurement of services. The laws in yet other States do not deal with the procurement of services at all. It would therefore seem that the procurement of services is, in many instances, not subject to procedures that are sufficiently open, fair and competitive to ensure adequate quality and a fair price for the public purchaser. In this context, model statutory provisions could be used to assess the adequacy of existing legislation and as a model for new legislation where none presently exists.

6. Subsequent to the earlier decision to delay formulation of provisions on services, a reason that has arisen for the preparation of model provisions in the near future is the need of various States that are already enacting domestic legislation on the basis of the Model Law to have a model for a comprehensive legislative framework for procurement, one that covers the procurement of services.

7. There have also been further developments in the treatment of procurement of services by multilateral organisations concerned with procurement. In particular, there are now concrete proposals within the General Agreement on Tariffs and Trade (GATT) aimed at extending the GATT Agreement on Government Procurement to also cover the procurement of services. Futhermore, the European Community, as a follow-up to its existing directives on procurement, has now enacted Council Directive (EEC) 92/50 relating to the Coordination of Procedures for the Award of Public Service Contracts. An expansion by UNCITRAL of the scope of its work to cover services would be in line with the steps taken by those organisations to broaden the scope of legal instruments governing procurement to encompass services.

II. DIFFERENCES BETWEEN PROCUREMENT OF SERVICES AND PROCUREMENT OF GOODS OR CONSTRUCTION

8. Unlike the procurement of goods or construction, the procurement of services typically involves the supply of an intangible commodity whose quality and exact content may be difficult to quantify. The precise quality of the services provided will be largely dependent on the skill and expertise of the service providers. This is in contrast to the supply of goods or of construction, where technical and quality specifications are more suited to be specified in the solicitation documents and are relatively easy to monitor and enforce during perfomance. Furthermore, contracts for the procurement of goods and of construction usually contain guarantees of quality and performance.

9. Since it is often not practicable to monitor and to enforce quality and performance standards in contracts for procurement of services, the best assurance that the procuring entity has of receiving high-quality services is to ensure that the supplier possesses a high level of technical competence and skill. The price of services has therefore often not been considered as important a factor in the evaluation and selection process as the quality and competence of the supplier. From this perspective, price-based procedures for evaluation and comparison of tenders as currently set out in article 29 of the Model Law would not necessarily be considered appropriate for the procurement of services.

10. Since technical criteria have usually been regarded as more important evaluation factors than price, the practice has tended to be to evaluate the technical and the price aspects of the offer separately. The service providers who have the best-evaluated technical ability then either compete on the basis of price or on the basis of an evaluated combination of both price and technical ability, or they engage in negotiations with the procuring entity regarding price or any other aspects of their tender.

III. POSSIBLE EVALUATION PROCEDURES FOR MODEL STATUTORY PROVISIONS ON SERVICES

11. Apart from the tendency to evaluate the price separately from other factors, the principles and procedures for the procurement of goods and of construction may generally be made applicable to the procurement of services. Variations would involve mainly the evaluation procedures and criteria so as to give effect to the relative importance of the technical competence and quality of the supplier.

12. Identification of the types of evaluation factors to be recognized is generally settled in practice. Those factors will usually concern: the general technical competence of the service providers; the qualifications and competence of the personnel specifically assigned to provide the services; and the suitability of alternative proposals, if any have been sought. Along with the evaluation criteria themselves, the relative weight to be given to each factor and the manner in which the weighting is to be applied in the evaluation should also be predetermined and disclosed to service providers in the solicitation documents.

13. There are basically three methods by which price can be taken into account separately from the evaluation according to technical criteria. In the first method, the service providers that attain the highest technical-competence rating (e.g. beyond a specified threshold level) are placed in a straightforward price competition in which the offer with the lowest price is to be selected. In the second method, the results of the technical evaluation and the price proposals are given relative weightings and the service provider with the highest combined evaluation is the successful one. In the third method, the procuring entity holds negotiations on the price or any other aspects of the tender with the provider with the highest technical rating, with the aim of getting the best value. If negotiations with that provider are unsuccessful, the procuring entity then negotiates with the provider rated second, and so on down the list, until a procurement contract is concluded, or until all remaining tenders are rejected.

IV. SCOPE OF SERVICES TO BE COVERED

14. Some States may wish to exempt certain services from the competitive procurement process. This would be mainly when the nature of certain services or that of their providers makes the services more amenable to being acquired directly, rather than being procured through competitive means. By "direct acquisition" is meant the obtaining by the procuring entity of the required services through direct purchase from a service provider, without having placed a number of service providers through a competitive procurement procedure. The European Community dealt with the issue of the scope of services to be covered by exempting some services (e.g. arbitration and conciliation services) from the operation of the Directive.

15. It would not necessarily be feasible or useful to attempt to list in a comprehensive way in a model law the scope of services to be covered by each enacting State, since States may differ as to which services to include. It would therefore appear to be preferable to leave the question of scope of services to be covered up to enacting States. Futher guidance on the issue could be provided in a commentary. This would be in keeping with the general approach of the Model Law to recognize that, while it is preferable to subject as much of public procurement as possible to the Model Law, States may wish to exclude certain types of procurement.

16. Some States may also wish to subject the procurement of different services to different procurement methods. The EC Directive provides three different procurement methods and divides services into two separate lists. The first list consists of "priority services", which are subject to the full operation of the Directive whereas the second, "non-priority" list, refers to services whose procurement is subject to less rigorous procedures. It may be noted that the EC hopes to review the Directive in three years with the intention of combining the two lists so as to make the Directive fully applicable to a wider range of service contracts.

V. POSSIBLE METHODS OF FORMULATING MODEL STATUTORY PROVISIONS

17. It would appear that the preferable method of formulating model provisions on the procurement of services would be to prepare an additional chapter ("IV bis") for the UNCITRAL Model Law on Procurement, dealing exclusively with the procurement of services. Such an additional chapter would necessitate a number of amendments in the Model Law, in particular with respect to definitions and the application of certain sections of the Model Law to the chapter on services.

18. The main advantage of the above approach is that it would result in a consolidated model law covering all procurement and would guide enacting States in the formulation of a consolidated law. Futhermore, it would avoid the preparation of an entirely separate model law on the procurement of services, an approach that would not only involve duplication of work but

would also have the disadvantage of presenting to States two model laws dealing with essentially the same subject matter. The suggested approach would also permit the Commission to adopt finally at the present session the Model Law, dealing with goods and construction. The Commission could then mandate the Working Group to prepare the additional chapter on services and to identify the amendments to the text of the Model Law, that would be needed to incorporate a chapter on services. It may also be considered desirable for the text of the provisions on services to be submitted to the Commission at its next session, in view of the urgent need for such model provisions in a number of countries.

19. The other method would be to provisionally approve the Model Law on Procurement (covering goods and construction) and to mandate the Working Group to prepare the extra chapter on services, but without re-opening matters of substance in the Model Law as approved. Using either method, once the additional chapter and the amendments are agreed, a consolidated, amended version of the Model Law, covering goods, construction and services, would then be issued.

ANNEX

DRAFT ADDITIONAL ARTICLES AND AMENDMENTS TO THE UNCITRAL MODEL LAW ON PROCUREMENT TO ENCOMPASS PROCUREMENT OF SERVICES

(The draft articles below are meant to be illustrative and are intended to assist in assessing the feasibility of preparing an additional chapter for the Model Law to encompass the procurement of services.)

DRAFT AMENDMENTS TO THE MODEL LAW

1. Add services to the definition of "procurement" and move the reference to "incidental services" to the definition of "goods" so that the definition of "procurement" would read as follows:

> "Procurement" means the acquisition by any means, including by purchase, rental, lease or hire purchase, of goods, construction or services.

Comment: The purpose of this amendment would be to add services to the scope of the Model Law.

2. Add a definition of services to read:

> (d bis) "Services" means the provision by suppliers or contractors of products that are neither goods nor construction.

Comment: A definition of services might be considered to be unnecessary. However, since there is a definition of "goods" and of "construction", for the sake of consistency a definition of services may also be included. The above definition would imply that all procurement by public entities could be governed by the Model Law since anything that did not constitute goods or construction would be defined as services.

3. Add a reference to incidental services in the definition of "goods" as follows:

"goods" includes raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity, and includes services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves.

Comment: In view of the deletion of the reference to incidental services from the definition of "procurement", the effect of this addition is to enable the procuring entity to procure incidental services that are an integral part of a goods-supply contract, in accordance with the provisions in the Model Law that regulate the procurement of goods. Otherwise, the procuring entity would have to procure those incidental services in accordance with the proposed chapter IV bis on the procurement of services. Such a reference to incidental services is already found in the definition of "construction".

4. In article 6(5), add a cross-reference to article 37w(4)(b) as follows: "Subject to articles 8(1), 29(4)(d) and 37w(4)(b)".

Comment: This amendment would add preferential margins based on nationality for the procurement of services as an additional exemption to the general rule of non-discrimination on the basis of nationality.

5. In article 7(1), add a cross-reference to chapter IV bis on services as follows: "... prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapters III, IV or IV(bis), ..."

Comment: This amendment would have the effect of expressly making the provisions of Article 7 on prequalification proceedings applicable to the procurement of services.

6. In article 9(2), add a cross-reference to article 37x(3)(b),(c),(d) and (e).

Comment: Article 9(2) deals with those communications in the procurement of goods or construction that would not have to be transmitted in a manner that provides a record of the communication. Those types of communications in the procurement of services are to be found in article 37x(3)(b),(c),(d) and (e).

7. In article 32(1) and (5), add a cross-reference to articles 37w(4)(a) and 37x concerning the acceptance of tenders in the procurement of services.

Comment: Article 32(1) and (5) makes a direct reference to provisions in the Model Law on the acceptance of tenders in the procurement of goods and of construction. The additional cross-references would have the effect of expressly making the provisions of Article 32(1)and (5) on acceptance of tenders applicable to the procurement of services.

8. In article 38, add a cross-reference to articles 37w(2),(3) and (4), and 37x(3)(d) and (e).

Comment: This amendment would have the effect of adding to the list of exclusions in article 38 the decisions of the procuring entity that, in the procurement of services, would not be subject to recourse proceedings.

DRAFT ADDITIONAL ARTICLES

CHAPTER IV bis METHODS AND PROCEDURES FOR PROCUREMENT OF SERVICES

Article 37s. Application of chapters I, III and V

(1) The provisions of chapters I, III and V of this Law shall apply to the procurement of services, except to the extent that those provisions are derogated from in this chapter.

(2) The provisions of chapters II and IV of this Law shall not apply to the procurement of services, except to the extent that those provisions are made applicable by this chapter.

Comment: Chapters I (General Provisions) and V (Review) apply to chapter IV bis because they are generally applicable to the entire Model Law. Chapter III (Tendering Proceedings) applies because, as stated in paragraph 11 of the present note, to a significant measure the principles and procedures for the procurement of goods and of construction can be applied to the procurement of services. The principal derogations from chapter III would therefore relate to the types of evaluation criteria and documentation required to evaluate qualifications and to examine, evaluate and compare tenders. Chapters II and IV do not apply because they concern conditions for use and procedures for procurement methods that are not applicable to the procurement of services except to the extent that articles 37y and 37z make them applicable.

Article 37t. Contents of invitation to tender and invitations to prequalify

(1) The invitation to tender shall contain:

(a) the information required in accordance with article 19(1), except the information referred to in sub-paragraphs (b) and (c) thereof;

(b) a description of the services to be procured;

(c) the desired or required time for the provision of the services.

(2) An invitation to prequalify shall contain at least the following information:

(a) the information required in accordance with article 19(1),(a),(d),(e),(g) and (h), and article 19(2)(a),(b),(c),(d) and (e);

(b) a brief description of the services to be procured.

* * *

Article 37u. Prequalification proceedings

(1) Prequalification proceedings shall be carried out in accordance with article 7, except to the extent derogated from in paragraph (2) of this article.

(2) The prequalification documents shall contain at least the following information:

(a) a request for information from the supplier or contractor on the experience and capacity of the personnel that will be involved in the provision of the services;

(b) a description of the services to be procured;

(c) the information referred to in article 7(3).

Article 37v. Contents of solicitation documents

(1) The solicitation documents shall contain at least the following information:

(a) the information referred to in article 21, except the information referred to in subparagraphs (d),(e),(g),(h),(i) and (u);

(b) a description of the services required;

(c) the required time in which the services are to be provided;

(d) the manner in which in the tender price is to be formulated;

(e) a request for information on the experience of the personnel that will be involved in the provision of the services, unless the information has been provided in prequalification proceedings in accordance with article 37u(2)(a);

(f) if alternative proposals to the contractual terms and conditions or to other requirements set forth in the solicitation documents are permitted or required, a statement to that effect;

(g) the criteria that will be used in evaluating the proposals and the relative weight to be accorded to the criteria in accordance with article 37w(1);

(h) the method by which the price will be taken into account in the evaluation of tenders in accordance with article 37w(4).

(2) If prequalification proceedings have not been engaged in, the solicitation documents shall also contain:

(a) a request for information on the past experience of the supplier or contractor and its personnel in providing services of a kind similar to those to be procured;

(b) the qualification criteria that will be used in the evaluation of tenders.

Comment on articles 37t, 37u and 37v: The additional documentation required by the procuring entity in the procurement of services is mainly intended to enable the procuring entity to ascertain the technical competence and ability of the supplier and contractor and of the personnel that will be assigned to implement the procurement contract.

Article 37w. Examination and evaluation

(1) The procuring entity shall establish the criteria for evaluating the tenders and determine the relative weight to be accorded to each criterion and the manner in which they are to be applied in the evaluation. The criteria shall concern:

(a) the experience of the suppliers and contractors and their technical competence in providing services comparable to those required by the procuring entity;

(b) the conformity of tenders with the requirements of the procuring entity;

(c) the qualifications and competence of the personnel proposed to provide the services;

(d) if alternative proposals were sought or required in accordance with article 21(g), the suitability and adequacy of the proposals made;

(e) the price.

(2) The procuring entity shall establish a threshold level with respect to quality and technical aspects that the tenders shall have to attain in order to merit futher consideration under paragraph (4) of this article.

(3) Without considering the price of the tenders, the procuring entity shall rate each tender in accordance with the factors for evaluating the tenders and the relative weight and manner of application of those factors as set forth in the solicitation documents. The procuring entity shall then rank the tenders in accordance with the ratings.

(4) (a) The procuring entity shall then compare the prices of the tenders that have attained a rating at or above the threshold level established in accordance with paragraph (2) of this article. The succesful tender shall be either:

(i) the tender with the lowest price; or

(ii) the tender with the highest combined evaluation of the price, and of technical capacity as rated in accordance with paragraph (3) of this article; or

(iii) the tender which the procuring entity selects after negotiations in accordance with article 37x.

(b) If authorized by the procurement regulations (and subject to approval by ... (each State designates an organ to issue the approval),) in evaluating and comparing the tenders, a procuring entity may grant a margin of preference for the benefit of tenders for provision of services by domestic suppliers or contractors. The margin of preference shall be calculated in accordance with the procurement regulations.

Comment: Article 37w is meant to give effect to the principle referred to in paragraphs 8 to 10 of the present note that the major factor in the examination and evaluation of tenders in the procurement of services is the technical competence and ability of the supplier or contractor. The establishment of a threshold level enables the procuring entity to disregard those tenders whose technical competence rating is too low to merit futher consideration.

The procuring entity is presented with three options as to how to combine an evaluation of technical and price factors. The first option, in paragraph (4)(i), is presented because, if the qualification threshold is set at a high level, then those suppliers and contractors that attain a rating at or above that level would in all probability be able to provide the services at a more or less equal level of competence. This would permit the procuring entity to put those tenders through a straightforward price competition where the tender with the lowest price would be the successful one.

In the second option, as set out in paragraph (4)(ii), the procuring entity may wish to weight and rate the price of the tenders as a separate criterion, and then combine the two weighted criteria in evaluating each tender. It would then compare the ratings of the tenders on the basis of the combined evaluations and the tender with the highest combined rating would be the successful one.

Under paragraph (4)(iii), the procuring entity may negotiate with suppliers so as to ascertain the succesful tender. Such negotiations are subject to article 37x.

Article 37x. Negotiations

(1) The procuring entity may engage in negotiations with suppliers and contractors as a means of ascertaining the most succesful tender if it has so specified in the solicitation documents.

(2) (a) Any negotiations between the procuring entity and a supplier or contractor shall be confidential.

(b) Subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or any other information relating to the negotiations without the consent of the other party.

(3) The procuring entity shall employ the following procedures in the negotiations with suppliers or contractors:

(a) invite for negotiations on the price or other aspects of its tender, the supplier or contractor that has attained the highest rating in accordance with article 37w(3);

(b) inform the suppliers or contractors that attained ratings above the threshold level that they may be considered for negotiations if the negotiations with the suppliers or contractors with higher ratings do not result in a procurement contract;

(c) inform the other suppliers or contractors that they did not attain the required threshold level;

(d) if it appears to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (3)(a) of this article will not result in a procurement contract, the procuring entity shall inform that supplier or contractor that it is terminating the negotiations;

(e) the procuring entity shall then invite the supplier or contractor that attained the second highest rating for negotiations; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers and contractors for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining tenders.

Comment: It would appear that negotiations to ascertain the most successful tender are most commonly used in the procurement of consultancy services. Article 37x aims at ensuring that the negotiations are fair to both the procuring entity and the suppliers and contractors by providing for confidentiality and respect for the ranking in the technical rating, while leaving the procuring entity some flexibility in determining which supplier or contractor best meets its needs.

Article 37y. Request for quotations

(Subject to approval...(each State designates an organ to issue the aproval),) the procuring entity may engage in procurement for services by means of a request for quotations in accordance with article 36 when the circumstances in article 15 arise in regard to the procurement of services.

Article 37z. Conditions for use of single source procurement

(Subject to approval... (each State designates an organ to issue the approval),) the procuring entity may engage in single-source procurement for services in accordance with article 37 when the circumstances in articles 14(1)(d) and 16 arise in regard to the procurement of services.

Comment to articles 37y and 37z: These articles make applicable to the procurement of services articles 15, 16, 36 and 37, in case it may be appropriate to procure services by means of request for quotations or single source procurement. The conditions for use and the procedures for those two methods as applicable in the procurement of goods and of construction are therefore made applicable to the procurement of services.

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POSSIBLE FUTURE WORK

Note by the Secretariat

Addendum

Guidelines for pre-hearing conferences in arbitral proceedings

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INTRODUCTION

1. It was observed at the Congress on International Trade Law held by the Commission during its twenty-fifth session in 1992, as well as at other fora discussing international arbitration, that the principle of discretion and flexibility in the conduct of arbitral proceedings might in some circumstances make it difficult for participants to predict the manner of proceeding and to prepare for the various procedural actions. In connection with those observations, it has been stated that such difficulties could be avoided or reduced by holding at an early stage of arbitral proceedings a conference between the arbitrators and the parties in order to discuss and plan the proceedings. Furthermore, it was suggested that it would be useful to prepare guidelines for such "pre-hearing conferences". Possible work by the Commission on such guidelines is discussed in section I.

2. The Commission at its nineteenth session in 1986 considered a report entitled "Co-ordination of work: activities of international organizations on certain aspects of arbitration" (A/CN.9/280). 1/ The report covered activities of various international organizations with respect to the following topics of arbitration: multi-party arbitration, taking of evidence in arbitral proceedings, international court assistance in taking evidence in arbitral proceedings, the law applicable to arbitration agreements, adaptation or supplementation of contracts by third persons, and a code of ethics for arbitrators in international commercial arbitration. The purpose of the report was to provide information on the activities of other organizations and to invite consideration by the Commission of whether any of those issues warranted closer examination from the point of view of coordination of work and possible future work by the Commission itself. The Commission was of the view that multi-party arbitration and the taking of evidence in arbitration gave rise to issues that merited further consideration. 2/ These two topics are among those considered in section I, in the context of possible guidelines for pre-hearing conferences, since it is believed that a number of issues arising from these two topics can appropriately be addressed by such guidelines. Further considerations of the two topics are contained in sections II and III. Conclusions are set forth at the end of the paper.

I. PRE-HEARING CONFERENCE

A. Introductory remarks

3. Arbitration rules governing arbitral proceedings, in particular the stage of proceedings when hearings are held and various documents exchanged, typically allow a fair degree of discretion and flexibility in the conduct of arbitral proceedings.

1/ Reproduced in United Nations Commission on International Trade Law Yearbook, volume XVII: 1986, part two, IV.

2/ Report of the United Nations Commission on International Trade Law on the work of its nineteenth session (1986), Official Records of the General Assembly, Forty-first Session, Supplement No. 17, A/41/17 (ibid., part one, A), paras. 254-258.

4. An example for the flexibility and discretion in the conduct of proceedings is article 15(1) of the UNCITRAL Arbitration Rules, which provides:

> "1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

5. The principle of flexibility and discretion has two kinds of limits. First, the discretion of the arbitral tribunal does not extend to questions that are settled in the applicable rules; in the case of the UNCITRAL Rules, this is indicated in article 15(1) in the introductory phrase "Subject to these Rules". 3/ Second, the arbitral tribunal must observe mandatory procedural provisions of the law applicable to the arbitration. 4/ Such mandatory provisions, however, often do not increase the level of certainty and predictability of arbitral proceedings. One mandatory principle, which is in various formulations present in all procedural systems, is expressed in article 18 of the UNCITRAL Model Law on International Commercial Arbitration: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

6. The principle of discretion and flexibility is useful and generally considered as the best approach inasmuch as it can accommodate different procedural styles and thus allow arbitral proceedings to be adapted to the case at hand and to be conducted in the procedural style to which the parties and the arbitrators are accustomed.

7. The need for flexibility and discretion diminishes in so far as the participants in the arbitration are in a position to plan the proceedings and prepare their procedural actions. If such planning does not take place, it is possible, in particular in an international arbitration, that a party or a member of the arbitral tribunal will find the proceedings surprising, unpredictable and difficult to prepare for. This may lead to misunderstandings, delays and increased costs of proceedings. Factors such as differences in procedural traditions are mentioned as reasons for such difficulties. It may be added that, since arbitrations do not have to follow, and usually do not follow, procedural patterns usual in a court, and since many arbitrators have developed individual variations of a procedural

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3/ The UNCITRAL Arbitration Rules provide several exceptions to the general principle of flexibility in the conduct of proceedings; they concern, for example, delivery of notifications, communications or proposals (art. 2(1)); obligation to hold oral hearings if either party so requests (art. 15(2)); notice of oral hearings (art. 25(1)); requirement to identify in advance any witnesses to be heard (art. 25(2)); and various aspects of taking evidence by experts (art. 27). In addition, the Rules contain specific provisions on the steps to be taken in order to establish the arbitral tribunal and commence the proceedings, as well specific provisions relating to the arbitral award.

4/ This requirement is expressed in article 1(2) of the UNCITRAL Rules; it is also expressed in statutory provisions on setting aside of arbitral awards and on recognition and enforcement of arbitral awards.

style, those difficulties may arise also in arbitrations in which the participants' legal backgrounds are not dissimilar.

8. As a measure to avoid such difficulties, there exists a practice of holding, shortly after the constitution of the arbitral tribunal, a meeting between the arbitral tribunal and the parties with a view to clarifying and planning the conduct of subsequent proceedings. Appropriate procedural agreements are concluded or decisions taken at such meetings in order to make subsequent hearings more effective and predictable. Meetings of this kind are referred to in practice by terms such as "pre-hearing conference", "preliminary hearing", "pre-trial review", or "administrative conference". The present paper uses the term "pre-hearing conference".

9. Few sets of international arbitration rules make specific reference to pre-hearing conferences. Among the rules that do so are the Rules of Procedure for Arbitration of the International Centre for the Settlement of Investment Disputes (ICSID) (1984) (art. 21(1)). Among the rules that do not refer to a pre-hearing conference are, for example: the UNCITRAL Arbitration Rules, Rules of the London Court of International Arbitration, and the International Arbitration Rules of the American Arbitration Association. The procedure for drawing up the "Terms of Reference" at the beginning of an arbitration, as specified in article 13 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce, is in some of its elements similar to a pre-hearing conference; nevertheless, while the terms of reference are rather specific about the claims and points at issue, they typically do not address the procedural details usually dealt with in a pre-hearing conference.

10. Pre-hearing conferences are in practice convened irrespective of whether the agreed set of arbitration rules deals with such a conference. This indicates that arbitral tribunals consider the decision to convene such a conference to be within the general procedural authority of the arbitral tribunal to conduct arbitral proceedings in the manner it considers appropriate (see above, para. 4).

11. The confidential nature of arbitration makes it difficult to measure the extent of the practice of holding pre-hearing conferences. Judging by reports of practitioners, it seems that in a good number of international arbitrations such conferences are held. It appears that pre-hearing conferences are particularly likely to be convened in cases where the arbitrators see the role of the arbitral tribunal more as one of a moderator of the proceedings as opposed to an active investigator, and where, in accordance with this procedural tendency, the parties are expected to assume a fair degree of procedural initiative.

12. It might be concluded that, since there appear to be no reports objecting in principle to the practice of holding pre-hearing conferences, and since many commentators praise the usefulness of the practice, it may be

expected that pre-hearing conferences are likely to become more frequent also where they have not been customary. 5/

B. Proposal for preparation of guidelines for pre-hearing conferences

13. It is suggested that holding a pre-hearing conference constitutes a useful practice in that it facilitates the preparation of the parties for the proceedings, helps avoid misunderstandings and expedites arbitrations. Pre-hearing conferences are particularly useful in international arbitrations, in which the expectations of parties or arbitrators as to the manner of proceeding may differ. Furthermore, the focused and early discussion of procedures at a pre-hearing conference fosters adopting procedural decisions by consensus, as opposed to the presiding arbitrator making procedural orders or the parties imposing procedures on the arbitral tribunal by their agreement.

14. For a pre-hearing conference to be effective, it is highly advisable for the arbitrators to prepare an agenda with topics for discussion and to give the parties advance notice of those topics. Arbitrators who have had limited experience with pre-hearing conferences may find it time consuming to prepare one. Similarly, an insufficiently experienced party may find it difficult to participate effectively in such a conference.

5/ The VIIIth International Arbitration Congress, in the context of the consideration of a hypothetical international commercial case, heard replies to the question whether in that kind of case it was customary to hold a pre-hearing conference. According to the replies, in some parts of the world, such as the United States, England and Nigeria, it is customary to hold such conferences; for arbitrations under the aegis of the Court of Arbitration of the International Chamber of Commerce (ICC), it was said that meetings for the preparation of "terms of reference", which are regularly held, often serve as a pre-hearing conference (see, however, para. 9). For some other parts of the world, such as Arab countries, Eastern Europe or Japan it was indicated that such conferences were unusual or not customary; some replies portraying the situation in those other parts of the world indicated that there are no formal obstacles to holding such conferences and that some pre-hearing conferences have been held. See International Council for Commercial Arbitration, Congress series no. 3, Comparative arbitration practice and public policy in arbitration, General Editor Pieter Sanders, 1987, Kluwer, Deventer, the Netherlands, pp. 63-66.

15. There exist some guidelines for the preparation and conduct of pre-hearing conferences. 6/ However, those guidelines, usually rather short and in the form of a checklist of topics to be discussed, were prepared for the work of a particular arbitral institution under a particular set of arbitration rules or were designed for domestic cases.

16. In order to facilitate the preparation and carrying out of pre-hearing conferences, it is suggested that it would be useful for the Commission to prepare guidelines for pre-hearing conferences, taking into account various legal traditions and the needs of international commercial arbitration. This work would contribute to the dissemination of practical knowledge about arbitration, and would facilitate participation in arbitrations of persons who have little contact with arbitral practice in traditional arbitration centres.

17. The purpose of the guidelines would be to increase certainty and predictability in arbitral proceedings, while maintaining flexibility in the conduct of proceedings. The guidelines would do so by drawing the attention of the parties and the arbitrators to questions that could usefully be considered at a pre-hearing conference. Those questions could concern technical details in the implementation of the rules governing the proceedings as well as questions not dealt with by those rules.

18. The assumption would be that the parties involved in the pre-hearing conference have agreed on a set of arbitration rules or, if they have not, that they may wish to do so at the pre-hearing conference. The decision to use the guidelines would not in itself mean any modification of the agreed arbitration rules. It might be appropriate, however, for the parties to agree at the pre-hearing conference on procedural solutions that would complement the agreed set of arbitration rules. It may also be that the parties would wish to modify the agreed rules in light of the discussions at the pre-hearing conference. In order to facilitate such agreements, it may be appropriate for the guidelines to contain, with respect to selected procedural issues, illustrative clauses, possibly in alternatives.

19. While the participants would normally make their decisions at the pre-hearing conference, it might be useful in some cases for the tribunal to meet after the conference and draft a document setting out decisions resulting from the conference.

20. The guidelines should draw attention to the obligation to observe mandatory procedural law.

21. Generally speaking, the purpose of pre-hearing conferences is to consider questions of arbitral procedure. Nevertheless, in this context it would not be useful to make a clear distinction between procedure and substance, since it is frequently beneficial at pre-hearing conferences to touch upon issues that may not be strictly procedural (e.g., precise definition of the relief sought, stipulations of undisputed facts, and exchange of information concerning points at issue).

6/ For example, the Iran - United States Claims Tribunal has adopted the Internal Guidelines of the Tribunal (undated), reproduced in Iran - United States Claims Tribunal Reports, vol. I, 1983, p. 98. Another example are the Guidelines for Expediting Large, Complex Commercial Arbitrations (1990) of the American Arbitration Association.

22. The timing of pre-hearing conferences should be flexible. While a pre-hearing conference is typically held shortly after the arbitral tribunal has been appointed, the development of the case may make it useful for the participants to meet at more than one pre-hearing conference.

23. While work by the Commission on the proposed subject might be regarded as a useful complement to the UNCITRAL Arbitration Rules and, more generally, as an appropriate continuation of the Commission's work in the area of arbitration and conciliation, it appears that any guidelines elaborated by the Commission would not necessarily have to be tied to arbitrations governed by the UNCITRAL Arbitration Rules.

C. Possible topics for consideration at pre-hearing conference

24. The purpose of the following tentative outline of topics that may be discussed at a pre-hearing conference is to facilitate consideration by the Commission of whether to prepare the guidelines and to elicit observations to be used in the preparation of draft materials by the Secretariat, were the Commission to decide to proceed with the project. 7/

25. It is suggested that, while the guidelines should contain a fairly complete list of questions to be considered, it should be made clear in the guidelines that not all the questions should necessarily be put on the agenda of a pre-hearing conference. Furthermore, the list of questions in the guidelines should not be regarded as exhaustive.

(a) Rules governing arbitration

26. If in case of an ad hoc arbitration the parties have not agreed on a set of arbitration rules, it is advisable that they do so at the pre-hearing conference.

(b) Administrative support

27. The participants may wish to consider whether they wish an institution to provide administrative support to the arbitration. If so, it is useful to consider the types of administrative services needed, the types of services available and the costs involved.

(c) Appointment of secretary of the tribunal

28. The participants may wish to consider whether, in view of the size and complexity of the case, it is warranted for the arbitral tribunal to appoint a person who is to carry out administrative tasks under the direction of the tribunal (secretary, registrar or administrator). If such a person is to be appointed, it is recommendable to discuss the types of administrative tasks that person will carry out. (The guidelines might include examples of such administrative tasks.)

7/ In drafting a number of items in this outline use was made of the article by Howard M. Holtzmann "Balancing the Need for Certainty and Flexibility in International Arbitration Procedures", written for the Twelfth Sokol Colloquium on International Law "International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?", University of Virginia School of Law, March 27-28, 1992.

(d) Possibility of settlement

29. The guidelines, in discussing whether settlement of the dispute should be a topic at a pre-hearing conference, should recognize that in principle the parties should not be hindered in attempting to settle the dispute. Nevertheless, it may be said that, in particular when settlement does not appear easily attainable, it is advisable, in order to preserve the effectiveness of the pre-hearing conference, to limit the discussions at the conference to the following: (i) the status of any settlement discussions (limited to whether any discussions took place or are likely to take place); (ii) consideration as to whether the possibility of settlement discussions should affect the scheduling of the arbitral proceedings; and (iii) whether the parties would be willing to consider conciliation or other forms of alternative dispute resolution procedures and, if so, whether they wish to proceed on the basis of a set of rules such as the UNCITRAL Conciliation Rules.

(e) Points at issue, relief or remedy sought, order of deciding issues

30. If points at issue or the relief or remedy sought have not been clearly defined in the submitted statements, it is advisable to clarify them, without, however, hearing arguments in support of claims. Consideration might be given to identifying issues that could be decided as preliminary questions. It might also be considered whether any issue (e.g., whether the defendant is liable) should be decided in a partial award earlier than other issues (e.g., the amount of damages).

(f) Uncontested statements of fact

31. In order to simplify the taking of evidence, it is advisable for the parties to stipulate that certain statements of fact are to be regarded as uncontested. If the parties are willing to do so, a time period may be set within which they should submit the stipulations in writing to the arbitral tribunal.

(g) Place of arbitration

32. If the place of arbitration has not been determined, the participants may wish to determine the town or country and the locale where the arbitration is to be held.

33. The participants may wish to discuss whether any reason exists for conducting part of the proceedings outside the locale or place of the arbitration. For example, circumstances may make it appropriate to hear witnesses, to hold meetings of the arbitral tribunal for consultation among its members, or to inspect goods, other property or documents at a place other than the locale, town or country of the arbitration.

(h) Hearings

34. It is advisable to consider the following:

(i) the expected length of hearings;
(ii) whether the hearings will be held on consecutive days or will be separated;
(iii) time schedule for hearings;
(iv) the order in which the parties will make their oral presentations;
(v) whether opening statements or closing statements will be heard;

(vi) whether rebuttal and rejoinder statements will be permitted; if so, whether certain limitations should be observed (e.g., whether a rebuttal or rejoinder by a party should be limited to matters covered in the other party's previous statement);

(vii) any right of the arbitral tribunal to impose time limits on oral arguments or testimonies;

(viii) whether the parties should submit a written summary of the arguments made orally; if so, whether summaries should be submitted at the hearing or could be submitted shortly thereafter;

(ix) the manner of taking oral evidence by witnesses (on this matter it might be decided to include in the guidelines illustrative clauses on which the parties could agree or on which the arbitral tribunal can model its procedural decision); 8/

(x) whether witnesses will be required to make an oath or affirmation and, if so, its form, taking into account any laws of the place of arbitration governing the administration of oaths;

(xi) whether interpretation will be needed and, if so, the arrangements therefor and how costs will be borne;

(xii) whether a stenographic transcript or a tape recording of the hearings will be made and, if so, the arrangements for those services and how costs will be borne.

(i) Language of proceedings

35. Unless the language or languages to be used in the proceedings has already been determined, the participants should make that determination in accordance with the applicable rules.

36. It may be discussed whether documents or exhibits annexed to the statement of claim, and documents and exhibits to be submitted later, that are not in the language of the proceedings may be submitted in their original language or should be accompanied by a translation. (The guidelines might contain further considerations regarding costs or a possible decision that identified documents or exhibits or types of documents or exhibits may be submitted in the original language.)

(j) Written statements

37. The following questions may be considered:

(i) which written statements, in addition to the statements of claim and defence, should a party submit;

(ii) which written statements is a party entitled to submit (e.g., a claimant's replication to the statement of defence and the defendant's rejoinder);

(iii) whether post-hearing written statements will be permitted;

8/ Different solutions may be offered: one may be to provide that witnesses will be questioned first by the arbitral tribunal, and then may be questioned by the party who called the witness, cross-examined by the other party and re-examined by the party who called the witness; it may also be provided that the procedure is subject to control by the arbitral tribunal, including the right to deny a party to question a witness. Another solution may be for a witness to be examined and cross-examined by the parties under control of the presiding arbitrator, while the arbitral tribunal retains the right to pose questions during or after the parties' questioning.

(iv) whether all statements should be made consecutively or whether the arbitral tribunal expects them to be submitted simultaneously;

(v) the structure of written statements; 9/

(vi) a time schedule for submitting written statements;

(vii) the manner of transmitting the written statements (e.g., they may be exchanged directly between the parties, with copies to the arbitral tribunal, or they may be filed with an administrator and transmitted by the administrator to the arbitrators and the other party).

(k) Documentary evidence

38. It is advisable to determine a time schedule for submitting documentary evidence.

39. The parties may be encouraged to agree to submit jointly one set of documents whose authenticity is not disputed ("the agreed bundle"). It should be made clear to the parties that the purpose of this procedure is to avoid duplicate submissions and discussions concerning the authenticity of documents, and that the procedure does not prejudice the position of the parties concerning the significance of the content of the documents.

40. It may be useful to agree that, unless a document is contested within a specified time period, (i) the document is accepted as having originated from the indicated source, (ii) a copy of a communication (e.g., letter, telex, telefax) is accepted without further proof as having been received by the addressee and (iii) a photocopy is accepted as correct. It may be clarified that, at least as regards the presumption under (iii), a document may be contested later if the arbitral tribunal considers the delay justified.

41. It may be considered whether voluminous or complicated documentary evidence should be presented by reports of independent persons (e.g., public accountants or consulting engineers) or through summaries, tabulations, charts, extracts or samples. This approach should be combined with arrangements that give the other party the opportunity to review the underlying data and the methodology of preparing documents based on that data. A time schedule may be advisable.

42. The arbitral tribunal may enquire whether a party intends to seek, or to request the arbitral tribunal to seek, production of documentary evidence from the other party. If so, conditions such as the following may be laid down: the document must be described with reasonable precision; the arbitral tribunal must have recognized the documentary evidence as relevant, admissible and material; the document must be within the control of the party from whom production is sought; and the seeking party must have made reasonable but unsuccessful efforts to obtain the document. The parties should be reminded that the arbitral tribunal would be free to draw its conclusions from the failure of a party to produce a properly requested document. In addition, it may be useful to establish a time-frame for submission of a request for documents, for production of documents or other response to the request.

9/ An example of such a structure is provided in article 31(3) of the Rules of Procedure for Arbitration of the International Centre for the Settlement of Investment Disputes (ICSID).

(l) Physical evidence

43. It may be useful to enquire whether a party intends to submit physical evidence other than documents and to determine arrangements for such submission (e.g., time schedules, the opportunity for the other party to inspect the evidence in advance of the hearing, and measures to safeguard the evidence).

44. If a party or the arbitral tribunal intends to request an on-site inspection of goods, other property or documents, it may be useful to consider arrangements and time schedules.

(m) Practical requirements concerning written statements and exhibits

45. When extensive submissions are likely, it might be useful to determine a number of practical details such as:

(i) number of copies in which each writing is to be submitted;
(ii) size of paper;
(iii) uniform system for numbering of exhibits;
(iv) method for identifying exhibits, including tabs;
(v) requirement that when a party refers to a submitted document, the document must be identified by its heading and document number assigned to it;
(vi) requirement that paragraphs in documents prepared for the proceedings be numbered;
(vii) whether translations will be included in the same volume as the original text or will be submitted in a separate volume.

(n) Evidence of witnesses

46. If witnesses are to be heard, and it has been agreed that the party presenting the evidence must submit in advance of the hearing a written communication relating to the testimony of the witness, it is advisable to consider the elements of such a communication. It might also be appropriate to prepare an illustrative clause. (In preparing the guidelines on this point, account should be taken of existing texts, such as for example, art. 25(2) of the UNCITRAL Arbitration Rules and art. 5 of the IBA Rules of Evidence. 10/) (As to the manner of taking oral evidence of witnesses, see above, para. 34, item (ix)).

47. It may be useful to consider arrangements for submitting evidence of witnesses in the form of written and signed statements, including the question whether such statements should be sworn to and, if so, what formalities would be required.

10/ The Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration ("IBA Rules of Evidence") were adopted in 1983 by the Council of the International Bar Association; the Rules are published in a brochure of the International Bar Association; also published in Yearbook Commercial Arbitration, Kluwer, Deventer, vol. X-1985, pp. 152-156, and in Arbitration International, vol. 1, no. 2 (July 1985), pp. 119-124.

48. It may be considered whether certain persons affiliated with a party should be presumed interested in the outcome of the case and therefore excluded from testifying (e.g., executives, employees of certain status or regardless of status, shareholders or pensioners of a company). If certain persons are excluded from testifying, it may be considered how will the arbitral tribunal receive information from them.

49. It is advisable to clarify whether it is proper for a party or a legal adviser to interview witnesses or potential witnesses prior to their appearance at a hearing.

(o) Expert evidence

50. The decisions to be made at the pre-hearing conference would depend on whether the agreed upon arbitration rules foresee that experts are to be appointed by the arbitral tribunal or whether it is up to the parties to present expert testimony.

51. In the first case, the participants may discuss, for example, (i) whether one or more experts will be appointed; (ii) whether the arbitral tribunal should invite comments of the parties on the choice of the expert or the expert's terms of reference; (iii) arrangements regarding the costs for the expert; (iv) procedures to permit the parties to express in writing the opinion on the expert's report, to interrogate the expert at a hearing and to present an expert witness to testify on the points reported on by the expert appointed by the arbitral tribunal.

52. If the arbitral tribunal itself does not appoint experts, and it is entirely up to the parties to present evidence of expert witnesses, the guidelines on the point may be an adaptation of foregoing paragraphs 46-49 which relate to evidence of witnesses.

(p) Procedural arrangements for multi-party arbitration

53. When the arbitration involves more than two parties and possibly also more than two disputes ("multi-party arbitration"), it is advisable to discuss the anticipated course of proceedings in order to avoid unnecessary delays and costs and to ensure the respect of each party's procedural rights.

54. It is possible that the disputes joined into one multi-party arbitration are covered by arbitration agreements that have not been harmonized (e.g., they refer to different sets of arbitration rules). The pre-hearing conference offers an opportunity to eliminate any such conflict by agreement of the parties.

55. It is advisable to identify the main points at issue in the various disputes involved, with a view to ascertaining whether it would be useful to divide the multi-party proceedings into stages. The first stage may be devoted to any objections concerning the jurisdiction of the arbitral tribunal. The following stages may concentrate in appropriate order on reaching decisions that in some way constitute preliminary decisions in another dispute (e.g., facts to be established in one dispute may be relevant in another dispute, or liability found to exist in one dispute may affect the decision in another dispute).

56. Since the decision in one dispute may affect the position of a party in another dispute, it is important to give each interested party an opportunity to present its arguments on the issues that affect that party. If some issues do not affect all the parties involved, it may be possible, in order to save costs, to plan the hearings in such a way that a party would have to be present only at hearings of concern to that party.

57. It is advisable to consider at the pre-hearing conference procedural questions such as the scheduling of meetings, flow of communications among the parties and the arbitral tribunal, the manner in which the parties will participate in hearing witnesses, the appointment of experts and the participation of the parties in the taking of evidence by experts, the order in which the parties will make statements, and the apportionment of the deposits for costs.

II. MULTI-PARTY ARBITRATION

1. Introductory remarks

58. As noted above in paragraph 2, the Commission, at its nineteenth session in 1986, considered that multi-party arbitration required further study.

59. There are many situations that may give rise to a dispute involving more than two parties and possibly also more than two disputes. The following situations are some of the many examples of the notion of multi-party arbitration:

- a case in which a single arbitration is to decide more than one dispute between different pairs of parties. For example, in a construction contract, one arbitration may be established to decide two disputes arising from the same construction defect, one between the purchaser and the contractor and another one between the purchaser and the architect; in another example, the sale of goods by A to B and the resale of those goods to C may give rise to a single arbitration to decide the dispute between A and B and the dispute between B and C, both disputes arising from the same defect in the goods;

- arbitration in which the dispute is between parties A and B, but where a third party C, who has an interest in the outcome of the dispute, is allowed to join the proceedings in order to submit evidence and make statements. Such a situation may arise, for example, in an arbitration between purchaser A and seller B because of defects in the goods, in which case the responsibility of party C (who sold the goods to party B) may depend on whether the arbitral tribunal finds the goods to be defective. Such cases are sometimes referred to as "joinder", "impleader" or "intervention".

- a multilateral contract (e.g. a joint venture or consortium) may give rise to a dispute in which on each side one or more parties to the contract are involved.

60. A possible benefit of establishing a multi-party arbitration, as opposed to considering disputes in separate arbitrations, is that multi-party arbitration avoids inconsistent decisions, a possibility which, while not frequent, exists when related disputes are treated in separate arbitrations.

For example, if the purchaser of a construction works sues for the same defect the contractor and the designer in separate proceedings, the independent and uncoordinated evaluations of the facts may result in the purchaser being unsuccessful in both cases. Another potential benefit is that considering the related issues in one proceedings may save time and costs. Such savings can be achieved, for example, when pieces of evidence or arguments relevant in more than one dispute are considered once for all the disputes.

61. In spite of such possible benefits, it is often difficult to agree on and establish a multi-party arbitration, and complications may arise in carrying out such an arbitration.

62. At the time of setting up a network of contracts affecting more than two parties or a multilateral contract, when dispute settlement clauses are typically formulated, it is usually impossible to know which parties, and with what interests, will be implicated in a dispute. This makes parties reluctant to agree on a multi-party arbitration clause.

63. After the dispute in a multi-party situation has arisen it may be difficult to obtain agreement of all the parties to establish a multi-party arbitration. One reason may be a party's reluctance to allow a person who is not a party to the contract in dispute to obtain access to facts concerning the contract (e.g., a seller of goods may not wish the producer of the goods to be involved in a dispute with the ultimate buyer of those goods, or the main contractor may prefer not to involve a subcontractor in the dispute with the purchaser of industrial works).

64. Another difficulty, assuming that the parties have agreed in principle to hold a multi-party arbitration, may be that arbitration agreements covering the different disputes involved foresee different methods of appointing the arbitrators. Furthermore, even if those methods do not differ or have been harmonized, the interests of the parties may differ to the extent that each party wishes to appoint an arbitrator. Those circumstances may hinder the usual appointment of a single-member or three-member arbitral tribunal.

65. A small number of jurisdictions have attempted to overcome the difficulties in setting up a multi-party arbitration by allowing a party who considers that two or more cases should be dealt with in one proceedings to obtain a court order consolidating the cases into a single multi-party arbitration. Legislation to this effect has been adopted in the Netherlands, Hong Kong, and in the state of California, while in some other jurisdictions of the United States of America such a power of courts has been recognized in case law. In some jurisdictions (e.g., in Australia and Canada) laws have been adopted empowering courts to order consolidation on terms established by the court, but only if all the parties have agreed to consolidation. It may be noted, however, that considerations in some countries as to whether to adopt such legislation have led to the decision not to do so because potential complications involved in court-ordered consolidations were thought to outweigh its potential benefits. A recommendation against allowing court-ordered consolidations was taken, for example, in 1990 in England by a law reform advisory committee.

66. Furthermore, assuming that the arbitral tribunal has been established, multi-party proceedings covering several disputes can be more complicated to manage than bilateral proceedings. Complications may arise, for example, in planning the sequence of issues to be considered, in taking evidence and

hearing arguments in such a way that each interested party has an opportunity of presenting its case, in scheduling meetings, and in managing the flow of documentation. Delays and costs resulting from such complications may reduce, or even exceed, the savings the parties might have hoped to achieve by organizing a multi-party arbitration.

2. Possible future work by the Commission

67. It appears that, in view of the great variety of possible multi-party situations and in view of the reluctance of parties to agree to multi-party arbitration, it may not be promising to undertake a project concentrating on the elaboration of a model multi-party arbitration clause. For situations when the parties have in principle agreed that a multi-party arbitration be held but have difficulties in establishing the arbitral tribunal, a partial solution may be an agreement entrusting the appointment of all the arbitrators to an appointing authority. A more flexible and comprehensive approach might be to prepare a guide explaining features, advantages and disadvantages of multi-party arbitration.

68. As to difficulties mentioned above in paragraph 66, which arise after the establishment of the arbitral tribunal, it appears that a pre-hearing conference presents a suitable opportunity to address them (see above, paras. 53-57).

69. The other issues (mentioned above in paras. 62-64), which arise before the establishment of the arbitral tribunal, cannot be discussed at a pre-hearing conference, because such a conference presupposes the existence of the arbitral tribunal. The Commission may wish to consider that the decision as to any future work on those issues (e.g., on a guide or on statutory provisions on court-ordered consolidation) should be made at a later stage. That decision would be easier to make in light of views to be formed during possible future work on guidelines for pre-hearing conferences and in light of the progress of work on multi-party arbitration in the International Chamber of Commerce (ICC).

70. An ICC Working Party (established by the ICC Commission on International Arbitration) has been working for a number of years on multi-party arbitration. As reported by the Working Party, one of its objectives has been to expand on the Guide on Multi-party Arbitration under the Rules of the ICC Court of Arbitration, which was adopted by the ICC in 1981 (ICC doc. no. 420/297, 28 April 1987; the ICC Guide was published in the ICC Brochure no. 404, 1982). In 1986 the Working Party submitted to the ICC Commission on International Arbitration draft guidelines on ICC multi-party arbitration and a draft multi-party arbitration clause (ICC doc. no. 420/276, 30 January 1986, annex I and II). The guidelines and the clause have not been adopted in view of controversial reactions from ICC National Committees (ICC doc. no. 420/282, 1 July 1986). The ICC Working Party is continuing work on the project.

III. TAKING OF EVIDENCE

1. Introductory remarks

71. As mentioned above in paragraph 2, the Commission considered at its nineteenth session that the taking of evidence was another area that should be further studied.

72. The practice of taking evidence in arbitration follows different patterns. Some arbitrators and parties are inspired by the "adversarial" system, under which it is essentially up to the parties to gather evidence and present it to the arbitrators, who do not take an active role in the evidentiary process. One of the cornerstones of the adversarial system is that the basic evidence is presented in the form of verbal testimony and that the party disputing the fact is able to test such testimony by cross-examining the witness. Other arbitrators and parties are influenced by the "inquisitorial" system, which, while maintaining the principle that the parties are to prove facts supporting their case, leaves room for the arbitral tribunal to take initiative in the taking of evidence. It appears, however, that in international arbitral practice sharp lines between the two procedural systems are disappearing and that participants in international arbitrations prefer to follow hybrid patterns.

73. Contractual arbitration rules largely do not regulate the details of the method of taking evidence. This is true also of the UNCITRAL Arbitration Rules, although these Rules address more questions of the evidentiary procedure than many other international rules. As a result, many questions of evidentiary procedure are in practice left to the discretion of the arbitral tribunal.

74. As noted above in paragraph 7, the principle of discretion and flexibility in the conduct of arbitral proceedings, while acceptable as a general approach, may give rise to difficulties when parties and arbitrators in a given arbitration have different expectations as to the method of taking evidence.

2. Possible future work

(a) Set of rules

75. One way for addressing those difficulties may be a set of contractual rules of evidence that the parties may agree upon. A disadvantage of a single set of rules, however, is that, to the extent it increases certainty and predictability in the proceedings, it reduces flexibility with which the evidentiary process can be adapted to legal traditions and expectations of the participants in an arbitration.

76. The IBA Rules of Evidence (see above, footnote 10) constitute such a set of rules prepared at the international level. The content of the IBA Rules is summarized in document A/CN.9/280 (above, footnote 1, paras. 30-38). As noted in the introduction to the Rules,

> "They are solely concerned with the presentation and reception of evidence in arbitrations and are recommended by the International Bar Association for incorporation in, or adoption together with, institutional or other general rules or procedures governing international commercial arbitrations."

77. The procedures provided by the IBA Rules are, on the one hand, fairly detailed, but, on the other hand, allow the arbitral tribunal a good degree

of discretion to act otherwise than prescribed in the Rules. 11/ As a result, the IBA Rules, read as a whole, while providing welcome guidance, do not provide more certainty than, for example, the UNCITRAL Arbitration Rules.

78. In view of the confidentiality of arbitration, it is difficult to estimate the extent to which the IBA Rules are used. On the basis of published awards and information obtained from practitioners, it appears that the cases in which the IBA Rules are formally agreed upon are not many. It may be, however, that more numerous are the cases in which the Rules, while not formally agreed upon, have served as a guide on taking evidence.

(b) Guide on taking evidence

79. Another way to address difficulties in taking evidence may be a guide that would discuss possible methods of taking evidence and perhaps also include various models of rules that parties could agree upon. 12/ Such a guide could contribute to the development of efficient arbitral practices by educating parties and arbitrators.

80. While recognizing the important benefits of such a guide, it may be noted that the guide would probably not decisively increase certainty and predictability of proceedings in a given arbitration. To achieve certainty and predictability, it is necessary to settle details of evidentiary procedure before the beginning, or at an early stage, of the arbitration.

81. It appears that parties are reluctant to settle details of arbitral procedure before the dispute has arisen. This reluctance may be due to a tendency of parties not to spend too much time on the arbitration agreement and rules of arbitration before a dispute has arisen. Another reason may be that in determining the details of evidentiary procedure it may be advisable to bear in mind the background of the arbitrators, which may make it inadvisable to settle those details only after the arbitrators have been appointed.

(c) Guidelines for pre-hearing conferences

82. In view of the considerations mentioned in the preceding paragraph, it appears that an appropriate moment for fixing details of evidentiary

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11/ For example, notwithstanding detailed rules on taking of evidence by witnesses, it is provided that the arbitral tribunal "shall have at all times complete control over the procedure in relation to a witness giving oral evidence" (art. 5(10)) and that "Nothing herein shall preclude the Arbitrator in his discretion from permitting any witness to give oral or written evidence" (art. 5(14)). Another such provision entitles the arbitrator "to exercise all the powers he deems necessary to make the arbitration effective and its conduct efficient as regards the taking of evidence" (art. 7(h)).

12/ The idea of guidelines for presenting evidence in arbitration was considered at the Vth International Arbitration Congress (New Delhi, 1975) (reports and discussions are published in Proceedings of the Fifth International Arbitration Congress, New Delhi, New Indian Council of Arbitration, 1975). See document A/CN.9/280, paras. 27 and 28.

procedure is a pre-hearing conference, which is typically held at an early stage of the arbitral proceedings. Guidelines for pre-hearing conferences, as outlined above in paragraphs 13-57, might suggest procedural solutions and, where appropriate, illustrative clauses that could be used in deciding on a particular procedure.

CONCLUSIONS

83. As discussed above in paragraphs 13-16, it is suggested that the Commission decide to prepare guidelines for pre-hearing conferences. In the context of that work, it is suggested to address also procedural arrangements for multi-party arbitration (see above, paras. 53-57) and for the taking of evidence (see above, paras. 38-52). If the Commission agrees with the suggestion, it may wish to request the Secretariat to prepare a draft text of guidelines. The draft might be submitted to the Working Group on International Contract Practices once it has completed its work on guarantees and stand-by letters of credit. Otherwise, the Commission itself might wish to consider the draft at its twenty-seventh session in 1994 or twenty-eighth session in 1995.

84. As to the question whether the Commission should undertake additional efforts in the area of multi-party arbitration, perhaps by preparing a guide, the Commission may wish to defer the decision. The taking of that decision may be easier in light of views to be formed during the work on guidelines for pre-hearing conferences and in light of the progress of work on multi-party arbitration in the International Chamber of Commerce (see above, paras. 69-70).

85. As to possible work on the taking of evidence in arbitration, perhaps in the form of a guide, the Commission may wish to consider that the need for such work, as well as its scope, would be clearer after agreement has been reached on the scope and substance of guidelines for pre-hearing conferences (see above, paras. 79-82).

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POSSIBLE FUTURE WORK

Note by the Secretariat

Addendum

Assignment of claims

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INTRODUCTION

1. During the Congress on International Trade Law held by the Commission during its twenty-fifth session in May 1992 in New York, it was suggested that work should be undertaken by the Commission on assignment of claims, an issue that the United Nations Sales Convention left unaddressed.

2. The present note addresses some of the legal issues in assignment of claims raising problems in international trade that are not addressed satisfactorily by existing rules, and considers the possible benefit of uniform rules that the Commission may wish to consider preparing.

I. ASSIGNMENT OF CLAIMS AS COMMERCIAL TRANSACTION

3. Assignment of claims is a transaction by which a party ("assignor" or "initial creditor") transfers to another party ("assignee") a claim for payment that the assignor has against a third party ("debtor"). Typical commercial purposes of assignments of claims are to sell a claim, pay a debt, or provide security for a debt.

4. In national as well as international trade, the assignment of claims finds extensive practical application as a means to give security for loans provided by financing institutions. Claims are assigned for security purposes either because the assignor does not have other suitable assets to offer as security or because the financing institution does not wish to take goods or other property as security. What distinguishes this type of security, as compared to a sale of a claim, is, for example, that, if the assignee collects payment from the debtor without the assignor having defaulted in the performance of the obligation for which the claim was given as security, the assignee may be liable to the assignor for breach of contract.

5. The assignment of claims often constitutes an element in "factoring" transactions, transactions in the context of which it is common that a supplier of goods or services assigns payment claims arising from its commercial activity to a financial institution ("factor"). The services of the factor may be to correspond with the debtors, collect the claims, keep certain records, possibly assume a part of non-payment risks, and to provide financing to the assignor of the claims. In a "forfaiting" transaction, which is in some respects similar to factoring, the assignor, in assigning the claim and receiving the amount of the claim reduced by the interest and the assignee's fee, obtains agreement from the assignee (financing institution) to waive the right to have recourse to the assignor if the claim is not paid.

II. LEGAL PROBLEMS IN ASSIGNMENT OF CLAIMS

6. One source of problems in the context of assignment of claims in international trade are divergences among national laws on the subject-matter. Another source of problems is the lack of modern rules on assignment adapted to deal with the needs of international trade. Furthermore, in some countries assignment of claims, or assignment as a security transaction, is not addressed at all in legislation.

7. National laws differ considerably on questions such as the requirements for the assignment to be valid. For example, some laws require a

writing, others require notification of the debtor or even registration of the assignment, while in yet other national laws no particular formality is required. Divergent answers are also given to questions of assignability of claims, for example, which claims are permitted to be assigned and which ones are not assignable, whether it is permitted to assign a future claim arising from a contract yet to be concluded, the validity of "bulk" assignments of all or part of present and future claims, the effect of an agreement between the creditor and the debtor that an existing or future claim should not be assigned (no- assignment clause), and whether it is possible to assign a part of a claim.

8. Differing requirements are provided in national laws for a valid assignment of claims to be effective towards the debtor. Those requirements are, for example, that the debtor obtained knowledge of the assignment, that the debtor was notified in a particular form about the assignment, that the debtor has consented to the assignment, or that the assignment has been registered in a particular public registry. Those differences are aggravated by the fact that many States recognize only assignments that have been made known to the debtor or registered in accordance with their national laws. As a result, an assignee seeking to enforce the assigned claim may be faced with a defence by the debtor that the assignment is not valid under the law of the State where the debtor has its place of business.

9. Particularly troublesome are different solutions in national laws as to the conflicts of priority between the assignee and another person asserting a right in the assigned claim. A priority conflict may arise between the assignee and an unpaid creditor of the assignor who has initiated an execution process regarding the assigned claim; in case of the assignor's bankruptcy, such a conflict may also arise between the assignee and the administrator of the assignor's assets who wishes the assigned claim to be included in those assets. Generally, the assignee is given priority if a certain act took place before the execution proceedings (or the opening of the bankruptcy proceedings), but national laws differ as to what that act should be. According to some national laws, the relevant act is the conclusion of the assignment agreement, in others it is the notification of the debtor and in yet others it is the registration of the assignment. It should be noted, however, that many national laws contain rules entitling the administrator of the bankrupt's assets to invalidate an assignment. The conclusion of the assignment within a specified period before the opening of the bankruptcy proceedings is a typical case in which, according to those rules, an assignment can be invalidated as a transaction contrary to the principle of equal treatment of creditors.

10. A priority conflict may also arise when the same claim has been assigned to more than one assignee. Such successive assignments may occur, for example, when a purchaser, pursuant to an agreement with its supplier who retain title to the goods until their price is paid, assigns to that supplier the claims to the proceeds from the sale of the goods, but later the purchaser assigns to a bank all its present and future claims against its clients in order to obtain working capital. Successive assignments may also be a result of a mistake or fraud. Some national laws give priority to the first assignee, others to the first assignee to notify the debtor, and yet others to the first assignee to register the assignment. It may be added that many national laws give priority to the supplier retaining title with regard to the proceeds from the resale of goods in case the supplier has lost the title to a good-faith buyer of the goods.

11. The above-mentioned problems and legal uncertainties may negatively affect the interests of all parties concerned. Sellers (assignors) face difficulties in mobilizing their claims in order to obtain working capital. The debtors' position is prejudiced in that uncertainties may arise as to their rights towards the assignees and the assignors. Assignees are often not in a position to know whether the assignments will be valid and enforceable in the country of the debtors. As a result, foreign creditors (assignees) may decide to withhold credit, which would otherwise be available, from sellers whose only or main asset is their claims against their clients.

III. PAST AND CURRENT WORK ON ASSIGNMENT AND RELATED TOPICS

A. National legislatures: special laws

12. The need for legal certainty and rules suited to trade has led some countries to modernize their legislation on assignment with the enactment of special laws dealing with assignment as a security transaction (for example, France has adopted such a law, known as Loi Dailly, in 1981, modified in 1984). In other countries, the revision of legislation on secured transactions, which includes assignment of claims, is being considered. 1/ In yet other countries, where the particular problems arising in the context of assignment as a security transaction are not addressed in sufficient detail by the existing general provisions on assignment, legal writers increasingly support a legislative intervention for the modernization of the law of assignment, or secured transactions in general.

B. The Commission: security interests

13. At its twelfth session (1979), the Commission had before it a report entitled "Security interests: feasibility of uniform rules to be used in the

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1/ A study group of the Permanent Editorial Board for the Uniform Commercial Code (UCC) of the United States of America has published in December 1992 a report calling for major changes in article 9 of the UCC, which deals with secured transactions. The report recommends to enlarge the scope of article 9 to cover property presently not covered, to improve the system for filing of security interests with appropriate offices, to facilitate the perfection of security interests in, inter alia, letters of credit, and to clarify the rights and duties of the secured creditor towards the debtor and other secured creditors. Work on the preparation of drafts of legislative modifications is expected to begin later in 1993. Similar legislative reviews are being undertaken in other countries.

financing of trade" (A/CN.9/165). 2/ The report noted that "although in principle there are no assets of a debtor which could not be used as collateral, certain kinds of moveables and moveables which are used in certain ways raise special problems" and that "it may be thought desirable to facilitate the use of claims not in the form of negotiable instruments as collateral, in which case special rules would be necessary" (paras. 47 and 51). As to the possible issues that may be addressed in uniform rules, the report suggested the form of security agreements, required and permissible provisions in the security agreement, rights of the secured party on default, types of movables which may be used as collateral, conflicts between the secured creditor and third parties, and the effect of foreign created security interests (paras. 41-59).

14. At the Commission's thirteenth session (1980), in the context of the discussion of the report "Security interests: issues to be considered in the preparation of uniform rules" (A/CN.9/186) 3/, which considered security interests in different kinds of movables, including claims, the conclusion reached was "that world-wide unification of the law of security interests in goods ... was in all likelihood unattainable". The Commission was led to that conclusion because it was concerned that the subject was too complex and the divergences among the different legal systems too many, as well as that it would require unification or harmonization of other areas of law, such as that of bankruptcy. During the discussion at that session, it was noted that it was advisable for the Commission to await the outcome of the work on the retention of title by the Council of Europe and on factoring by the International

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2/ Reproduced in United Nations Commission on International Trade Law Yearbook (hereafter referred to as "UNCITRAL Yearbook"), vol. X:1979, part two, II, C. Previous relevant reports on security interests are: report of the Commission on the work of its first session (1968), paras. 40-48 (UNCITRAL Yearbook, vol. I:1968-1970, part two, I, A); report of the Commission on the work of its third session (1970), paras. 139- 145, (UNCITRAL Yearbook, vol. I:1968-1970, part two, III A); doc. A/CN.9/102, "Security interests in goods", UNCITRAL Yearbook, vol. VI:1975, part two, II, 5); report of the Commission on the work of its eighth session (1975), paras. 47-63, (UNCITRAL Yearbook, vol. VI:1975, II, A); doc. A/CN.9/131 and annex, "Study on security interests" and "Legal principles governing security interests" (study prepared by Prof. Ulrich Drobnig of Germany) (UNCITRAL Yearbook, vol. VIII:1977, part two, II, A); doc. A/CN.9/132 "Article 9 of the Uniform Commercial Code of the United States of America", (UNCITRAL Yearbook, vol. VIII:1977, part two, II, B); report of the Commission on the work of its tenth session (1977), para. 37 (UNCITRAL Yearbook: vol. VIII:1977, part one II, A), and report of the Committee of the Whole II, paras.9-16, (UNCITRAL Yearbook, vol. VIII:1977, part one, II, A, Annex II).

3/ Reproduced in UNCITRAL Yearbook, vol. XI: 1980, part two, III, D.

Institute for the Unification of Private Law (UNIDROIT), prior to the Commission undertaking any further work of its own. 4/

C. UNIDROIT: Convention on International Factoring

15. Article 1.1 of the UNIDROIT Convention on International Factoring (Ottawa, 1988) specifies that the "Convention governs factoring contracts and assignments of receivables as described in this Chapter". According to article 1.2, "factoring contract", for the purposes of the Convention, means a contract by which a party ("the supplier") "may or will assign" to another party ("the factor") receivables arising from contracts of sale of goods made between the supplier and its customers ("debtors"), provided that a notice of the assignment is given to the debtor in writing and that at least two of the following four functions are to be performed by the factor: finance for the supplier, including loans and advance payments; maintenance of accounts (ledgering) relating to the receivables; collection of receivables; and protection against default in payment by debtors.

16. The Convention, which covers assignments of claims to the extent they take place in the context of factoring, deals to that extent with a number of assignment issues, such as notification of the debtor, validity of assignment of all present and future claims, invalidity of no-assignment clauses, and defences (including set-off) available to the debtor against the factor (assignee). Rules of the Convention on those issues would have to be taken into account, should the Commission decide to undertake work on assignments of claims. It may be noted that the Convention does not deal with the issue of priorities between the factor (assignee) and third parties, an issue that raises problems in practice, both in the context of factoring and in the context of assignment of claims in general. The Committee of Governmental Experts, which adopted the draft Convention, decided to exclude the issue of priorities between the factor (assignee) and third parties "on account of their extreme complexity ... notwithstanding the widely expressed regret that the Convention failed to regulate an aspect of the question which created very great difficulties at international level". 5/

D. Council of Europe/ICC: retention of title

17. The European Committee on Legal Cooperation (CDCJ) of the Council of Europe prepared in 1982 a draft Convention on retention of title. 6/ However, in view of the numerous reforms of the law on this subject, the Committee did not take a final position on that draft Convention, and in 1986 it decided to

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4/ Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (1980), Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17, A/35/17, paras. 26-28, (UNCITRAL Yearbook, vol. XI:1980, part one, II, A)

5/ UNIDROIT 1987, Study LVIII - Doc. 33, para. 10.

6/ European Committee on Legal Cooperation (CDCJ) (82) 15.

adjourn its work indefinitely pending the outcome of those reforms. 7/ The International Chamber of Commerce (ICC) has prepared a guide providing basic information on retention of title in nineteen national laws. 8/

E. UNIDROIT: security interests in mobile equipment

18. In March 1992, UNIDROIT convened a restricted exploratory working group of experts to examine the feasibility of drawing up uniform rules on certain aspects of security interests in mobile equipment. This working group found that such a project would be feasible if it were confined to certain international aspects of security interests in mobile equipment of a kind normally moving from one State to another in the ordinary course of business (e.g., aircraft and containers). A Study Group, convened by the President of UNIDROIT for the preparation of uniform rules, held its first meeting in March 1993 and will meet again in 1994.

F. EBRD: draft Model Law on Secured Transactions

19. The European Bank on Reconstruction and Development (EBRD) is currently preparing a model law on secured transactions which could be used for establishing national laws in countries in Central and Eastern Europe and the former Soviet Union. It is intended that the model law would establish a contractual security interest that a debtor may grant to a creditor in various types of assets, including payment claims. The model law, which is intended to be finished by autumn 1993, will likely contain rules on registration of the security interest and on conflicts of priority between several creditors asserting a right in the collateral. The work by the EBRD would have to be taken into account, should the Commission decide to undertake work on assignment of claims.

IV. FUTURE WORK

20. It is submitted that the disparity of laws on assignment of claims and the lack of modern rules on the topic (above, paras. 6-11) give rise to difficulties that constitute an obstacle to international and national trade. While the assignment of claims is an important means to obtain financing for commercial transactions, the disparity and uncertainty of laws and the lack of modern rules make it difficult for sellers, buyers and financing institutions to take full advantage of its use. In particular, it is difficult for financing institutions to know whether they may accept claims against foreign debtors as security for trade credit, what rights the financing institution would have under such an assignment, and how the assignment should be concluded for it to be effective against third parties and enforceable against the foreign debtor.

7/ European Committee on Legal Co-operation (CDCJ) (83) 36, paras. 20 to 25.

8/ ICC Publication No. 467.

21. In order to overcome such difficulties, it is suggested that the Commission consider preparing uniform legislative rules on assignment of claims. In such work, the Commission could draw useful guidance from the extensive preparatory work in its earlier project on security interests (above, paras. 13-14), the UNIDROIT Convention on International Factoring (above, paras. 15-16), the work of the European Bank for Reconstruction and Development (above, para. 19), as well as from national projects to modernize the law of security interests.

22. Uniform rules on assignment of claims would enhance the creditworthiness of those suppliers of goods (assignors) whose only, or main, assets are payment claims arising from their supplies. Financing institutions (assignees) would benefit from such uniform rules in that, in providing financing to clients, they would have certainty that their security interests in claims are enforceable. Buyers of goods and services (debtors) would benefit in that their rights and obligations would be clearly defined and harmonized, and that their suppliers, to the extent they would be able to use payment claims to obtain financing, would be more willing to supply goods on credit.

23. If the Commission agrees with the suggestion, it may wish to request the Secretariat to prepare, in consultation with interested international organizations, for the twenty-seventh session of the Commission in 1994, a study on the possible scope of uniform rules and on possible issues to be dealt with in the rules. Such a study could consider whether the uniform rules should be restricted to assignments for security purposes or whether the uniform rules should deal also with assignments other than for security purposes.

24. A further issue for the study would be whether the uniform rules should cover only international assignments and how should an international assignment be defined. Another question would be whether it would be desirable to establish a regime that would, in its area of application, displace the national regimes, or whether a special regime should be created which the parties could opt for by agreement. The study would also consider possible issues to be covered by the uniform rules, such as the form in which an assignment should be concluded; assignability of claims; no-assignment clauses; warranties of the assignor; defences of the debtor against the assignee; effects of an assignment towards third parties; any option or requirement for registering an assignment; feasibility and features of an international registration system for assignments or other security transactions; effects of registration; and priorities among several persons asserting a right to the assigned claim.

25. An important question to be considered in the study would be whether the uniform rules should be restricted to assignments of claims, or whether it would be desirable to prepare more broadly conceived uniform rules on security interests in movable assets, including claims. This aspect of the study would depend on the consideration of questions such as: (a) is there equal practical need and desirability for the harmonization of law in both areas; (b) what might be the time needed to complete a more comprehensive project as opposed to a project limited to assignment of claims; (c) would it be desirable to leave a dichotomy between unified rules on security interests in claims and non-unified national rules on security interests in other kinds of movable assets; (d) would certain rules (e.g., on the registration of security interests in a public register) have the same purpose and be subject to the same legislative policy in the case of movable goods and in the case of

claims. As to the possibility of work on security interests in movable goods, including claims, it may be noted that at the Congress on International Trade Law, held by the Commission during its twenty-fifth session in May 1992 in New York, it was proposed that the Commission should revive its earlier project on security interests (above, paras. 13-14). In support of that proposal, it was suggested that the Commission's main reason for discontinuing work on this topic might not have been so much the complexity of the issues involved but rather the realization that, at that time, unification was not necessary on a worldwide scale.

26. In presenting alternatives as to the scope of possible uniform rules, the study would also present to the Commission proposals for coordination of work and cooperation with other international organizations, in particular UNIDROIT and the European Bank for Reconstruction and Development.

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POSSIBLE FUTURE WORK

Note by the Secretariat

Addendum

Cross-border insolvency

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INTRODUCTION

1. At the Congress on International Trade Law held in May 1992 in New York in the context of the twenty-fifth session of the Commission proposals were made that the Commission consider undertaking work on international aspects of bankruptcy. In describing one of the proposals it was stated that it may not be practical to think of unifying the bankruptcy laws since in the evolution of international law we were too far from the time when we could expect countries to have similar bankruptcy laws. However, it was said that problems could be reduced to a more manageable level by focusing at issues in the State where the assets were located, as contrasted to the State where the bankruptcy proceedings were initiated, and answering how those assets should be handled.

2. The purpose of this note is to assist the Commission to decide whether an in-depth study on the desirability and feasibility of harmonized rules in this field should be undertaken.

3. After the introductory section I, section II considers some legal issues that may give rise to problems due to a lack of harmony among national laws. Section III provides a brief description of work at the international level towards harmonization of laws in the area. Conclusions are set out at the end of the paper.

I. GENERAL REMARKS

4. Most legal systems contain rules on various types of proceedings that may be initiated when a debtor is unable to pay its debts. "Insolvency proceedings" is the generic expression used in this note for those types of proceedings. Two types of insolvency proceedings may be distinguished, for which a uniform terminology has not emerged.

5. In one type of proceedings (hereafter referred to as "liquidation"), a public authority, usually a court, and typically acting through an officer appointed for the purpose (referred to here as "bankruptcy administrator"), takes charge of the insolvent debtor's assets with a view to transforming non-monetary assets into a monetary form, distributing the proceeds proportionately to the creditors, and, at the end of the proceedings, liquidating the debtor as a commercial entity. In some States this is the only type of proceedings used. Other terms that are often used for this type of proceedings are for example, bankruptcy, winding-up, faillite, quiebra, Konkursverfahren. It may be noted, however, that terms such as bankruptcy might be understood as having a broader meaning which includes also composition proceedings as described in the next paragraph.

6. The other type of proceedings (hereafter referred to as "composition"), which is known in many but not all States, exists as an alternative to liquidation proceedings. The purpose of the alternative proceedings is not to liquidate the insolvent debtor, but to allow it to overcome the financial crisis and resume normal participation in commerce. Such proceedings, also usually carried out under the supervision of a court, are typically aimed at reaching an agreement, or composition, between the debtor and its creditors about relief that should allow the debtor to reorganize and restore its commercial viability. The relief may be in the

form, for example, of partial abatement of the claims against the debtor, prolongation of payments periods, or renegotiation of existing debtor's obligations. While such relief is being negotiated, the debtor enjoys protection from enforcement actions of creditors over the debtor's assets. It may be possible for composition proceedings to be initiated during liquidation proceedings. Other terms used for this type of insolvency proceedings are, for example, reorganization, arrangement, concordat préventif de faillite, suspensión de pagos, administración judicial de empresas, Vergleichsverfahren.

7. For insolvency proceedings to be initiated, a court order is typically needed. The initiative to open such proceedings may be taken by the insolvent debtor itself (voluntary insolvency) or by a creditor or creditors (involuntary insolvency). In some States the same type of insolvency proceedings apply to all insolvent merchants, whereas others use two types of proceedings, one for legal persons and another for merchants who are natural persons.

8. In many States, for a court to have jurisdiction to open insolvency proceedings, a certain link between the debtor and the State is required. That requirement may be satisfied, for example, if the debtor has in that State its principal place of business, residence, corporate seat or centre of administration, or if the debtor is registered as a company in the State. This type of insolvency proceedings is often referred to as "domiciliary" insolvency proceedings.

9. In addition to domiciliary insolvency proceedings, a good number of States allow the opening of insolvency proceedings even if the above-mentioned domiciliary link between the State and the debtor does not exist. This type of insolvency proceedings, often referred to as "non-domiciliary" insolvency proceedings, can be initiated in a State if, for example, some of the debtor's assets are in the State or if the debtor who is a natural person is passingly present in the State. Some States allow the opening of this type of proceedings in a broad spectrum of situations, while in others the possibility of holding such proceedings is more restricted. These insolvency proceedings can be carried out in parallel and independently from any domiciliary or other non-domiciliary insolvency proceedings initiated in another State.

II. SOME ISSUES IN CROSS-BORDER INSOLVENCIES

10. Cross-border insolvency is the term frequently used for insolvency cases in which the assets of the debtor are located in two or more States, or where foreign creditors are involved. The following sections A to G describe some areas of cross-border insolvency where problems may arise due to a lack of harmony among national rules.

A. Effect of liquidation proceedings in one State on assets located in another State

11. In the legislation of many States it is expressly stated, or it is understood, that liquidation proceedings opened in the State are to take effect over all the assets of the debtor, including the assets located abroad. The intention is that all the debtor's assets should be available to the administrator for establishing the pool of proceeds from which the creditors are to be paid. Some of these laws expressly indicate that such universal effect of liquidation proceedings results only from a domiciliary liquidation and not from a non-domiciliary one (see above, paras. 8 and 9).

12. There are, however, also national laws according to which the effects of domiciliary liquidation proceedings taking place in the State is restricted to the bankrupt's assets located in that State. Such a self-imposed restriction has been criticized because it hinders the access of the creditors to all the assets of the debtor.

13. Many States claiming universal effect for their liquidation proceedings recognize, in varying degrees and with some limitations, the universal effect also for liquidation proceedings opened abroad. There are, however, also States which, while claiming universal effect for their liquidation proceedings, deny such effect to foreign liquidation proceedings.

14. In the States that are ready in principle to recognize foreign liquidation proceedings, a usual condition for recognition is that there be a substantial link between the bankrupt and the State of the liquidation proceedings. That link may be, for example, that the foreign liquidation proceedings are domiciliary proceedings (see above, para. 8) or that the bulk of the bankrupt's assets is located in that foreign State.

15. According to some national laws, for foreign liquidation proceedings to be given effect, it is necessary to obtain a formal recognition of the foreign court decision opening the proceedings. According to those laws, such recognition is usually subject to the same procedures as any recognition of a foreign court decision. In other national laws, the recognition of foreign liquidation proceedings, while being subject to certain controls (e.g., as to jurisdiction of the foreign court and the observance of fundamental principles of procedure), does not require a formal recognition procedure.

16. Even if liquidation proceedings taking place in a State is not given a full and formal effect by the States in which the bankrupt debtor has assets, there may be several ways to enhance the cross-border effectiveness of the liquidation proceedings. For example, if the person who is currently holding the bankrupt's assets is amenable to the jurisdiction of the State where the liquidation proceedings are taking place, the bankruptcy administrator may institute proceedings against that person for the surrender of those assets. In addition, the bankrupt debtor may be under a duty, or may be ordered by the court conducting the insolvency proceedings, to take the steps necessary to make all its assets abroad available to the bankruptcy administrator. Furthermore, a creditor who obtained in a foreign State full payment from the bankrupt debtor, and who is amenable to the jurisdiction of the State where the liquidation proceedings are taking place, might, under certain circumstances, be obligated by the court to surrender that payment to the administrator and accept to be paid under the same terms as the other creditors.

B. Cross-border judicial assistance

17. When insolvency proceedings are initiated in a State, the administrator of the debtor's assets or an interested creditor may wish to obtain assistance from a foreign court. The assistance, to the extent it is available, may consist, for example, of turning over to a foreign bankruptcy administrator assets belonging to the insolvent debtor; publicizing foreign insolvency proceedings; suspending a creditor's legal action against the debtor that would, contrary to the principle of equality among creditors, diminish the bankrupt's assets; granting measures of protection against

debtor's assets; staying an effort by a creditor to create or enforce a security interest regarding a debtor's property; challenging preferential transfers of property or transfers alleged to be fraudulent; opening local ancillary insolvency proceedings; or allowing the administrator to act in behalf of foreign creditors.

18. The current rules and practices on cross-border court assistance in insolvency matters are rather diverse. Some States, in particular those that deny effect to insolvency proceedings declared in a foreign country, are not prepared to entertain formal requests for assistance (e.g., by a foreign bankruptcy administrator). In those States, the only way for a foreign bankruptcy administrator to make local assets available to foreign creditors, or to obtain another form of assistance, may be to initiate local insolvency proceedings, in which the foreign creditors would then be able to participate, either themselves or through the foreign bankruptcy administrator.

19. Some States have rules that specifically address court assistance in cross-border insolvencies. Differences, however, exist as to the types of assistance available. In other States no specific rules exist on court assistance in foreign insolvencies. Furthermore, in some States cross- border court assistance is subject to fairly specific conditions, while in others this is a matter left largely to the discretion of the court.

C. Right of all creditors to participate in insolvency proceedings

20. Many national laws allow in principle all creditors, domestic and foreign, to participate in insolvency proceedings; however, foreign authorities are usually precluded from lodging public-revenue claims arising, for example, from tax, penal and similar obligations. Yet, in some States this preclusion does not apply if part of the debtor's assets originate from the State lodging its revenue claims.

21. According to the law of some jurisdictions, the principle of non-discrimination among creditors applies only for claims that are payable in the State in which the insolvency proceedings are taking place; in those jurisdictions, any claims payable exclusively abroad are subordinated to the claims payable in the State of the insolvency proceedings.

D. Priority rules in distribution of assets

22. Many national laws classify claims against the bankrupt with the purpose of establishing an order of priority among them. The claims granted the highest priority are to be satisfied from the bankrupt's assets in full before subsequent categories of claims can be paid.

23. Considerable differences exist among national laws as to the number and types of preferred categories of claims. The expenses of the liquidation proceedings and the fees of the bankruptcy administrator in many laws enjoy the highest priority. Specified fiscal claims by the authorities of the State where the liquidation proceedings take place are in many States also high on the priority list. The next priority is often given to claims for salaries by the bankrupt's employees, although in some States the preferential treatment is limited by an amount or by a maximum retrospective time- period for claims for arrears. Beyond these typical preferred categories of claims, the rules on subsequent preferred categories, defined by the type of creditors or transaction, are more diverse.

24. The question of priority of claims is generally determined by the rules of the State in which the liquidation proceedings take place, regardless of whether the case involves foreign creditors or assets surrendered from a foreign country. Such a conflicts rule means that a court, if it wants to respect priority expectations of creditors in liquidation proceedings that take place or may take place in its State, would be inclined not to surrender bankrupt's assets located in the State to a foreign bankruptcy administrator. The motives for refusing to surrender the assets are likely to be particularly strong when the assets requested to be surrendered would probably be consumed by the preferred fiscal claims by the State requesting the surrender. In this context, the preferred treatment of fiscal claims has been criticized, and it was argued that it would be easier to establish a workable system of cooperation between States in insolvency matters if the preferential treatment of fiscal claims were abolished or radically curtailed. It appears that such arguments may have led some States to restrict considerably the preferences accorded to such claims.

E. Cross-border compositions

25. In contrast to cross-border liquidation proceedings, in which an important issue is whether the proceedings opened in one State affects assets abroad, an important question in cross-border compositions is whether the terms of relief agreed upon in a composition in one State (e.g., abatement of claims) can be invoked by the debtor against a creditor in court proceedings in another State.

26. In many States, a clear answer to the question does not appear to have emerged in the legislation and case law. Opinions have been expressed that compositions are procedural agreements and that, as a result, they should have effect only in the country of origin. Another view is that, in the absence of an international agreement, a foreign composition should be recognized to the extent it concerns debts that are governed by the law of the State where the composition was concluded. Yet another view is that a composition should be binding on all those creditors who have participated or were given a possibility of participating in the composition. There is also a view that a foreign composition should be recognized under the same conditions as foreign liquidation proceedings. According to yet another view, one condition for recognition should be that the composition was carried out in a State with which the insolvent debtor has a close link (e.g., by having there the place of business, residence, centre of administration or the bulk of its assets); another condition should be that the composition was intended to encompass all creditors and that it did not discriminate among creditors or was not otherwise contrary to the public policy of the State where the composition is being invoked.

F. Recognition of security interests

27. Most national laws recognize that a creditor holding a security interest in an item of property included in the bankrupt's assets has a right to satisfy its claim by relying on the security interest, without having to surrender the proceeds for sharing with the other creditors. Such security interests, which can considerably diminish the availability of assets for meeting the claims of the unsecured creditors, are, for example, the retention

of title, pledge, assignment of a claim as a security 1/, mortgage, lien, or floating charge. Movable as well as immovable property may be subject to such security interests.

28. There are differences among legal systems as to the rules governing security interests. Differences concern, for instance, the types of security interests recognized in national laws, the formalities for establishing a security interest, the procedures for invoking a security interest, and the priority rules for cases when more than one creditor has a security interest in the same item.

29. Differences exist also as to the treatment of security interests in insolvency proceedings. The differences relate to issues such as: whether a particular type of security interest retains its effectiveness upon opening of insolvency proceedings; the right of the bankruptcy administrator with respect to the sale of the property subject to the security interest; the existence of any privileged claims enjoying priority over secured claims; and the conditions under which another creditor or the bankruptcy administrator may invalidate a security interest created during a specified time period before the opening of the insolvency proceedings.

30. In many national laws, security interests in tangible property are in principle considered to be governed by the national law of the State where the property concerned was located at the time of creation of the security interest. If that national law is different from the law governing the insolvency proceedings, a possible problem impeding the creditor to rely on the security interest may be that the security interest in question is not known in the national law governing the insolvency proceedings.

G. Impeachment of debtor's transactions prejudicial to creditors

31. Many States have rules that make it possible for the bankruptcy administrator or an interested creditor to set aside or modify a debtor's transaction that diminished the debtor's assets. Such transactions may be, for example, a sale of debtor's property on terms unusually favourable to the buyer, preferential payments of debts to selected creditors, or security interests created retrospectively for previously unsecured debts. National laws differ, for example, as to the types of transactions that may be affected, the types of remedies available to the bankruptcy administrator or an interested creditor, and the conditions for impeaching a transaction (e.g., the point in time before the commencement of the insolvency proceedings after which a transaction by the debtor becomes suspect and liable to impeachment, the terms of the transaction that make it impeachable, and knowledge by the debtor's contracting party about the possible insolvency of the debtor).

1/ Assignment of claims as a method of providing security to creditors is discussed in note A/CN.9/378/Add.3; para. 13 of that note refers to the previous work of the Commission in the area of security interests.

32. Difficult questions to which national laws give differing answers, or to which the answers are not settled, concern also conflicts of laws and conflicts of jurisdictions. The questions are, for example: whether, in a given State, a foreign bankruptcy administrator is entitled to request impeachment of a transaction or whether such a remedy is available only to a local bankruptcy administrator; whether a State would recognize a foreign court decision impeaching a transaction; and which national law is applicable to a claim for such a remedy (e.g., the law of the State where the insolvency proceedings take place, the law where the property in question is currently located or was located before the transaction, the law of the person who benefitted from the transaction or the law applicable to the transaction).

III. INITIATIVES TOWARDS REGULATION OF CROSS-BORDER INSOLVENCIES

A. Regional initiatives

1. Latin American States

33. In Latin America, three texts deal with international aspects of insolvency law: the Convention on Private International Law, Havana 1928 ("Bustamante Code") and two Treaties on Commercial International Law, 1889 and 1940 ("Montevideo Treaties").

(a) Bustamante Code

34. The Bustamante Code has been adopted by 15 Latin American States. It provides that the debtor's civil or commercial domicile is the link required for jurisdiction to open insolvency proceedings. If the debtor has one domicile, only insolvency proceedings in the State of the domicile are allowed; if the debtor has a commercial domicile in more than one State, proceedings can be opened in each of those States.

35. Provisions are included on: recognition in other contracting States of bankruptcy and composition orders; recognition of the powers of a bankruptcy administrator appointed in a foreign contracting State; recognition of foreign decisions setting aside or modifying transactions that were concluded within a specific period prior to the insolvency declaration and that prejudice the debtor's creditors.

(b) Montevideo Treaties

36. The relations between four Latin American States are governed by the Montevideo Treaty of 1889, while the relations between three Latin American States, of which one is also a Party to the 1889 Treaty, are governed by the Montevideo Treaty of 1940. The former provides rules for liquidation, while the latter provides guidance also for compositions, suspensions of payments and other analogous proceedings provided for in the contracting States.

37. Both Treaties refer to the debtor's commercial domicile as the required link for jurisdiction to open insolvency proceedings. If the debtor has a commercial domicile in other States, proceedings can be opened in each of those States.

38. Under the scheme of the Treaties, the authority of bankruptcy administrators, as determined by the laws of the State where the insolvency proceedings were opened, is recognized in all contracting States. Provisional measures can be enforced over property located in other States, and courts in those other States are to publicize the opening of the proceedings and the taking of the provisional measures. Provision is also made for local creditors in those States to petition for separate involuntary proceedings to be carried out in accordance with the law of the State where they are opened. Creditors can rely on security interests, in both immovable or movable property, before the court where the property is located, as long as those security interests were established before the opening of the insolvency proceedings.

2. Nordic Council

39. Under the auspices of the Nordic Council, the Nordic States concluded in 1933 the Convention between Denmark, Finland, Iceland, Norway and Sweden regarding Bankruptcy. The Convention was amended in 1977 and 1982.

40. Recognition is granted in all contracting States for bankruptcy proceedings opened in any contracting State where the bankrupt has its residence or registered office.

41. The Convention amalgamates all assets of the debtor in all contracting States into a single mass to be administered and distributed according to the rules of the State where the bankruptcy proceedings were opened. However, special preferences or security rights attached to the debtor's assets are to be governed by the law of the country where the assets concerned are located. Provision is made for publicizing the bankruptcy proceedings in other contracting States where assets of the debtor are located, preparation of an inventory of the debtor's assets, provisional measures, judicial assistance from authorities in other States, and recognition of judicial decisions, in particular for the purpose of confirming a composition with creditors.

3. Council of Europe

42. The member States of the Council of Europe concluded the European Convention on Certain International Aspects of Bankruptcy (Istanbul, 5 June 1990). Up to 1 June 1993, no State had adhered to it.

43. According to the Convention, the competence to open a bankruptcy is determined by the place where the debtor has the centre of its main interests; for companies and legal persons, unless the contrary is proved, the place of the registered office is presumed to be the centre of their main interests.

44. The main purpose of the Convention is to allow the bankruptcy administrator to act in other jurisdictions on behalf of the creditors, to take provisional measures, and to institute legal proceedings in any of the member States. In addition, when a debtor has been declared bankrupt in a State (main bankruptcy), the Convention provides that the debtor may, by virtue of this fact alone, be declared bankrupt in another contracting State (secondary bankruptcy). Furthermore, the Convention allows the bankrupt's creditors located in different States to introduce claims in the State where the bankruptcy proceedings were opened, and to receive adequate information about the proceedings.

4. European Communities (EC)

45. Efforts have been under way in the European Economic Community since the nineteen sixties to prepare a text on legal aspects of cross-border insolvency. The latest text being considered, the draft Convention on Insolvency Proceedings (1992), which the drafters have not yet released to the public, is, according to a written comment, not intended to harmonize the laws of the member States, but rather to construct legal conditions for handling cross-border bankruptcies in the EC by settling conflicts of laws and jurisdictions. To this end, the text is based on the notion that there should be one bankruptcy proceedings comprising all assets regardless of where they are located. The extent of universality may be limited by the possibility of the opening of one or more secondary proceedings, whose effects are confined to the territory of the States in which they were opened.

B. Other initiatives

1. The Hague Conference on Private International Law

46. The Hague Conference started work on regulation of bankruptcy in 1894. At its 28th session in 1928, the Conference decided to transform earlier drafts for a multilateral bankruptcy Convention into a model bilateral treaty. This model treaty was not widely adopted.

2. International Bar Association (IBA)

47. The International Bar Association formulated in 1989 a Model International Insolvency Cooperation Act (MIICA). The Model Act is based on the notion of universality and on the premise of a single administration of the insolvent debtor's assets wherever they are located.

48. The Model Act obligates the courts of enacting States to provide assistance to a foreign bankruptcy administrator. Such assistance may be: to make the debtor's assets available to the foreign bankruptcy administrator; to stay or dismiss an action against the debtor; to provide evidence relating to the insolvency; to recognize and enforce a foreign judgement; and to provide any other appropriate relief. The conditions for providing such assistance are: that the State of the bankruptcy administrator provides substantially similar treatment for foreign insolvencies as that provided in the Model Act; that the foreign court having jurisdiction over the bankruptcy administrator is a proper and convenient forum to supervise the insolvency proceedings; and that the administration of the property of the debtor in the respective foreign jurisdiction is in the overall interests of all creditors of the debtor. In case the requested court assistance is denied, the foreign bankruptcy administrator may commence insolvency proceedings in the State that denied the assistance.

CONCLUSIONS

49. The current lack of harmony among national rules governing cross-border insolvencies has often been noted as an obstacle to international trade. Attention has been drawn to the fact that, because of the disharmony of rules on issues such as cross-border effect of liquidation proceedings (above, paras. 11-16), international court assistance in insolvency matters (above, paras. 17-19), the right of creditors to participate in insolvency

proceedings (above, paras. 20-21), priority rules in the distribution of assets to creditors (above, paras. 22-24), cross-border effect of compositions between the insolvent debtor and creditors (above, paras. 25- 26), recognition of security interests created under a foreign law (above, paras. 27-30), or impeachment of debtor's transactions prejudicial to creditors (above, para. 31-32), the access of unsecured and secured creditors from different States to the debtor's assets is subject to obstacles, uncertainties and inequalities. A further negative effect of the disharmony of rules is that courts and legislators, in their tendency to protect creditors from their own territories, may be inclined to restrict recognition of foreign insolvency proceedings, may take measures favouring local creditors, and may be reserved in providing court assistance to foreign creditors. This situation may lead to several full-scale insolvency proceedings conducted simultaneously in different jurisdictions without meaningful coordination between them, which is wasteful, further increases the possibility of unequal treatment of creditors and may give rise to conflicts between actions of the various bankruptcy administrators.

50. It has been stated by commentators and associations of practitioners that it would be desirable to harmonize ground rules in some of the areas of insolvency law, which would allow international insolvencies, including compositions, to be resolved in a more predictable fashion and without undesirable conflicts between the jurisdictions interested in the insolvency. Views were expressed that it would be desirable to formulate a harmonized network of legislative rules that would enable a bankruptcy administrator, under certain conditions, to include in the assets from which the creditors will be paid also the debtor's assets located in a foreign State. One of the conditions for such extraterritorial effect of bankruptcy proceedings should be that the bankruptcy proceedings were initiated in accordance with harmonized rules on jurisdiction. Furthermore, the State requested to surrender assets to a foreign bankruptcy administrator should be allowed to ensure that specified local creditors are protected.

51. However, while recognizing the desirability of a workable system of cooperation between States in insolvency matters, it has also been pointed out in international discussions that it may be unrealistic to suppose that any principle of universality of insolvency proceedings could be attained at the global, or even at regional, level in the foreseeable future. It has been said that it will continue to be unacceptable that interests and expectations arising under local law could be overridden by the effects of insolvency proceedings taking place elsewhere.

52. The Commission may wish to bear in mind the foregoing views in determining whether it would be worthwhile for it to consider the matter in depth. Among the primary objectives of the in-depth consideration would be to identify the aspects of international insolvency law that lend themselves to being harmonized and the most suitable vehicle for the harmonization, such as a multilateral treaty, model law or a model bilateral treaty.

53. In the context of considering the foregoing issues, the Commission might also wish to study the question of possible effects of the opening of insolvency proceedings on relationships or proceedings beyond those comprised in the insolvency proceedings. For example, if, in the context of a bank guarantee, the principal becomes subject to insolvency proceedings, it may be useful to clarify whether there is any justification for the bank to suspend payment or terminate the guarantee on the ground that the proceedings reduce

the bank's ability to obtain reimbursement from the principal. A similar issue may arise in the context of a letter of credit when the applicant for the issuance of the letter of credit becomes subject to insolvency proceedings. In another example, when in an international arbitration the defendant becomes subject to insolvency proceedings, the question may arise whether the opening of the proceedings should have any effect on the arbitration. Such effects of insolvency proceedings on other relationships or proceedings are often determined not in the law on insolvency proceedings but in the law governing the respective relationship or proceedings.

54. Should the Commission consider the project useful, it may wish to express preliminary views on the direction of the future work and request the Secretariat to prepare, in consultation with other relevant international organizations, including the Hague Conference on Private International Law, for a future session of the Commission a study on the feasibility of harmonized rules on international insolvencies.